[redacted]

No. _____

In The Supreme Court Of The United States

October Term, 2003

03-9168

REGINALD SHEPARD,
PETITIONER,

v.

UNITED STATES OF AMERICA

Supreme Court U.S.
FILED
FEB 23 2004

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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

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**MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS**

NOW COMES Petitioner Reginald Shepard, by and through his undersigned attorneys, and pursuant to Rule 39.1, Supreme Court Rules, and Title 18, United States Code Section 3006A(d)(6), respectfully moves this Court for leave to proceed *in forma pauperis*, and to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

MAR 1 - 2004

without prepayment of fees. Leave to proceed *in forma pauperis* has never been sought in any other court. No affidavit is attached, inasmuch as Petitioner has been represented by appointed counsel under the Criminal Justice Act of 1964, as amended, in the district court and the court of appeals.

Respectfully submitted,

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**Counsel of Record for Petitioner*

Dated: February 21, 2004

No. _____

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## QUESTIONS PRESENTED FOR REVIEW

The Armed Career Criminal Act [18 U.S.C. §924(e)] imposes a mandatory minimum sentence of 15 years imprisonment for a person convicted of being a felon in possession of a firearm [18 U.S.C. § 922(g)] where that person has previously been convicted of three violent felonies or serious drug offenses or both. United States v. Taylor, 495 U.S. 575 (1990) held that Congress intended a sentencing court to employ a categorical approach to determine whether a defendant's prior convictions qualify as predicates for this sentence enhancement, looking only to the fact of conviction and the elements of the statute of conviction, or to the charging document and the jury instructions to determine whether all of the elements of generic burglary (an enumerated violent felony) were necessarily adjudicated in the state court. The questions presented are:

1. Whether, where the defendant has pleaded guilty to a nongeneric charge of burglary brought under a nongeneric statute, there is no



contemporaneous record of the guilty plea proceedings and the judgment of conviction reflects a general finding of guilty, the sentencing court is still bound by Taylor's categorical method of application or may instead be required to conduct an inquiry - including an evidentiary hearing - into the facts underlying the conviction, to determine whether, in the guilty plea proceeding, both the defendant and the government believed that generic burglary was at issue?

2. If so, whether the sentencing court may be required to consider a version of these underlying facts found in any document in the court file such as an investigative police report or a complaint application and, if the facts alleged in the document are not challenged by the defendant, regard them as sufficiently reliable evidence that the defendant was convicted of a crime including all of the elements of generic burglary to support an Armed Career Criminal Act enhancement?

## LIST OF PARTIES

All parties appear in the caption.

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## OPINIONS BELOW

The opinions of the United States Court of Appeals for the First Circuit, United States v. Reginald Shepard, No. 99-2167, 231 F3d 56 (1st Cir. 2000), cert. denied, 534 U.S. 829 (2001)["Shepard II"], and United States v. Reginald Shepard, No. 02-1216, 348 F3d 308 (1st Cir. 2003)["Shepard IV"] are reproduced in Appendix A.

## JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the Court of Appeals was entered on November 3, 2003. Petitioner Shepard filed a timely motion for reconsideration and reconsideration en banc on November 17, 2003. The order denying both was entered November 24, 2003. This petition is filed within 90 days after entry of judgment. See Supreme .Court Rule 13.1. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

No constitutional provision is involved.



## FEDERAL STATUTE INVOLVED

The text of 18 U.S.C. § 924(e) is reproduced in Appendix D.

## STATEMENT OF THE CASE

On March 3, 1999 Petitioner Reginald Shepard pleaded guilty in the United States District Court for the District of Massachusetts to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Thereafter, the Government sought to have Petitioner's sentence enhanced under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1)["ACCA"]. The ACCA mandates a fifteen year minimum punishment for a felon who has three prior convictions for a violent felony or serious drug offense.

Under Supreme Court precedent, whether a defendant's prior burglary convictions qualify as predicates for ACCA sentence enhancement is determined categorically by comparing the statutorily-defined elements of the crime of conviction to the elements of "generic" burglary as defined in Taylor v. United States, 495 U.S. 575

(1990). Where, as here, the state statute punishes both generic and nongeneric burglary, the sentencing court "may" consult the charging documents and jury instructions from the state court trial to determine whether all of the element of generic burglary were necessarily adjudicated against the defendant in the state court. Taylor, 495 U.S. at 601-602.

Here, the government presented state court records that Petitioner had five prior felony convictions, each based on a Massachusetts state court guilty plea as possible predicates for sentence enhancement under § 924(e). In each case, Petitioner had been charged under one of two Massachusetts non-generic burglary statutes [one does not require illegal entry if the burglary occurred in the nighttime, and both apply to entry into buildings and to places other than buildings][1].

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M.G.L. ch. 266 §16: "Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, . . . shall be punished ...."

M.G.L. ch. 266 §18: "Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or motor vehicle or vessel, with intent to commit a



Each complaint charged Petitioner solely in nongeneric statutory terms: e.g., "did break and enter in the day time the building, ship, vessel or motor vehicle of Craig Milanesi with intent to commit a felony therein, in violation of G.L. c. 266 s. 18."

No transcript of the guilty plea colloquies or other record of the elements or facts adjudicated in the state plea proceedings was presented to the sentencing court.[2] Neither the statute, the complaint nor the record of conviction evidences that Petitioner necessarily pleaded guilty to generic burglary in any of these proceedings.

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felony, no person lawfully therein being put in fear, shall be punished ...."
[emphasis supplied]

2

The government offered no evidence that verbatim records of the plea colloquies were not actually available. It merely cited the Massachusetts statute that requires the state district courts to keep the taped recordings for 2 ½ years and pointed out that each of Petitioner's convictions was older than that. Rule 211(A)(4), Special Rules of the District Courts (Massachusetts). The government has not said why the federal indictment on which Petitioner was being sentenced was not returned until some three years after he committed the underlying crime.

In four of the cases, the government offered complaint applications and the police reports which accompanied those applications as evidence that Petitioner had been accused of generic burglary in each case.[3] Petitioner objected that these descriptions were not properly included in the PSR and that the factual inquiry suggested by them was precluded under Taylor. Shepard II, 231 F3d at 61.

The district court, Nancy Gertner, J., ruled that Taylor precluded consideration of the challenged police reports and complaint applications. United States v. Shepard, 125 F. Supp.2d 562, 569-570 (D. Mass. 1999)["Shepard I"]. The district court also ruled that the government's documents were not reliable evidence of what was actually adjudicated in the state guilty plea proceedings. Her "lucid rationale" is set out in the First Circuit's first Shepard opinion. Shepard

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These documents were quoted verbatim in the Presentence Investigation Report ["PSR"] which nevertheless did not recommend that Petitioner be sentenced under the Armed Career Criminal Act ["ACCA"]. The First Circuit eventually disclaimed the relevance of the PSR in this case. Shepard IV, 348 F3d at 314.



II, 231 F3d at 61. Judge Gertner declined to sentence Petitioner under the ACCA; but in keeping with the Supreme Court's comment in Taylor, 495 U.S. at 602 n. 10, she found that Petitioner's criminal history score understated the seriousness of his record and departed upward, imposing a sentence of 46 months imprisonment followed by three years' supervised release. Shepard I, 125 F. Supp. 2d at 572. Judge Gertner informed Petitioner that this sentence was designed to allow him to take advantage of an intensive Bureau of Prisons drug treatment program.[4] Id; July 14,1999 Tr:25-26.

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Petitioner discharged his 46 month term of imprisonment on January 25, 2002. While he was imprisoned, Mr. Shepard satisfactorily completed a 500-hour drug abuse recovery program. He is currently under supervised release for a period commencing January 25, 2002 and scheduled to continue through January, 2005. Following his release from prison, Mr. Shepard married Regina Chaves Shepard on November 28, 2002 and on April 2, 2003 their daughter Aliana Shepard was born. Aliana is now 10 months old. Mrs. Shepard's six year-old daughter Alexis Huntley lives with the Shepards at 71 Tremont Street in Boston. At present, both Mr. Shepard and Mrs. Shepard are employed. Mrs. Shepard works at The Main Street Grill from 8:30 a.m. to 2:00 p.m. Mr. Shepard works at Consolidated Delivery & Logistics at 65 Sprague Street, Boston, from 4:00 p.m. to 3:00 a.m., working in two capacities. He is a warehouse supervisor from 4:00 a.m. until midnight, and is a

On the government's appeal, the Court of Appeals for the First Circuit reversed, holding that [1] the issue for the district court was whether, in the state guilty pleas, Petitioner and the government both believed that Petitioner was pleading guilty to generic burglary [Shepard II, 231 3d 67-68, 69]; [2]that the district court was required to consider the information in the PSR, the police reports and the complaint applications in making that decision [Shepard, 231 F3d at 67]; and [3] that Petitioner's Taylor objection to the government's documents was insufficient to create an issue of fact as to whether his state court pleas were to generic burglary. Shepard, 231 F3d at 68. Petitioner's motions for reconsideration and reconsideration en banc were denied by the First Circuit Court of Appeals, Judges Selya and Lynch dissenting. A copy of this order is reproduced in Appendix B.

The First Circuit's remand directed the

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delivery driver from midnight until 3:00 a.m. During the mornings while Mrs. Shepard is at work, Mr. Shepard provides the sole care for Aliana.



district court to evaluate the reliability of the police reports as a basis for finding whether the government and the defendant believed that his guilty pleas were to generic burglary, providing an "illustrative" list of questions:

> "As discussed in *Dueno*, did the court taking the guilty plea have before it the police reports and complaint applications described in the PSR, or any other documents describing the defendant's conduct? Where did the police reports come from? What took place at Shepard's plea hearings? More specifically, as discussed in *Harris*, did the defendant provide anything at his plea hearings to contest the facts set forth in the police reports and complaint applications, thereby suggesting that the government and the defendant did not share an understanding that he was pleading guilty to an offense that had the elements of a generically violent crime?"

Shepard II, 231 F3d at 68. Shepard was permitted to interpose further objections to the police reports which might, attack "their usefulness for determining whether Shepard and the government both believed that an entry into a building was at issue when he entered the guilty pleas." "Or Shepard might offer an account of what took place at his plea hearings, including the documents before the judge, that raises questions about that issue." Shepard II, 231 F3d at 69.

The government was allowed to present additional evidence,

> "usually limited to examining easily produced and evaluated court documents, including the judgment of conviction, charging papers, plea agreement, presentence report adopted by the court, and the findings of a sentencing judge.' *Spell*, 44 F3d at 939. To that list we add transcripts of the plea hearing or other documents that were before the judge who accepted the guilty plea at issue."

Id. Finally, the First Circuit instructed,

> "In the face of plausible objections from Shepard, and in the absence of a sufficient response from the government, the court may decide that it cannot conclude by a preponderance of the evidence that his pleas of guilty constituted admissions to unlawful entries of buildings. The government, of course, 'bears the burden of proving the applicability of an upward adjustment under the guidelines [or the ACCA]," *Dueno*, 171 F3d at 7."

Id. The district court was required to conduct a mini-trial to determine whether Petitioner's convictions were for generic burglary.

Judge Gertner carefully followed the Court of Appeals remand instructions in resentencing Petitioner. Shepard IV, 348 F3d at 314 n. 6. Petitioner filed an affidavit stating that, in his state guilty pleas, neither the police reports, the complaint applications nor the facts stated in them



had been presented and that he had not admitted to those facts in any of those proceedings. United States v. Shepard (III), 181 F. Supp.2d 14, 19 (D. Mass. 2002). The government submitted no further evidence.[5] Id, at 20, 22-25, 29.

Judge Gertner answered the remand questions:

> "According to the defendant's affidavit and uncontradicted by any other evidence, the court taking the guilty plea did not have before it the police reports and complaint applications described in the PSR or any other documents describing the defendant's affidavit. At Mr. Shepard's plea hearing, no one mentioned the police reports and complain application because the issues never came up. The police reports apparently come from the application for the complaint. There is no indication that they were ever made part of the record of the plea colloquy."

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[5] Judge Gertner repeatedly invited the government to submit affidavits from prosecutors or court personnel regarding standard practices in the state courts in question, as is permitted in Massachusetts practice when convictions are challenged and state court records are not available to settle the disputed facts. See, e.g., Commonwealth v. Quinones, 414 Mass 423, 432, 608 N.E.2d 724 (1993). Shepard III, 181 F. Supp.2d at 19 & n. 11.

The government filed two additional complaint applications or police reports evidencing two additional convictions. Shepard IV, 348 F3d at 310. Although one charges generic burglary, and the other five (total) charge nongeneric burglary, these six complaints have been treated as an undifferentiated group.

Id, at 25-26. After a careful discussion of Taylor and Shepard II, she concluded:

> "On this record, given this case law, I cannot conclude by a fair preponderance of the evidence that Reginald Shepard has been convicted of 'at least' three crimes of violence under the ACCA."

Id, at 29. The judge reimposed her original sentence. The government appealed again, claiming that the allegations in the complaint applications and police reports proved that Petitioner pled guilty to burglarizing buildings. Shepard IV, 348 F3d at 311.

The First Circuit acknowledged that Judge Gertner had carefully followed its detailed remand instructions in resentencing Petitioner[6], it concluded that "it is clearly erroneous to find that Petitioner did not plead guilty to at least

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[6] Shepard IV, 348 F3d at 314 n. 6: "In addition to the tension between the two decisions [United States v. Harris, 964 F2d 1234 (1st Cir. 1992) and United States v. Dueno, 171 F3d 3 (1st Cir. 1999)], our own prior remand in Shepard II may further have complicated matters by not calling attention to the en banc order in Sacko [United States v. Sacko, 178 F3d 1 (1st Cir. 1999)]. In all events, none of this confusion is the fault of the district judge who sought conscientiously to carry out this court's earlier mandate."



three burglaries of buildings." Shepard IV, 348 F3d at 314. The Court of Appeals attributed Judge Gertner's decision to "confusion" created by that ruling. Id. To clarify the law in the Circuit, the Court reverted to the "rule" of United States v. Harris, supra, which both revised Taylor's statement of the pertinent ACCA predicate inquiry and rejected Taylor's limitation on the permitted sources of information in the modified categorical inquiry allowed "in the rare circumstances" where sentencing courts could look past the elements of the statute of conviction. The Court of Appeals assumed that the sentencing court not only could, but must, look beyond the statute of conviction whenever that statute defines burglary more broadly than Taylor's generic definition. Shepard IV, 348 F3d at 310-312. The Court held that the sentencing court not only could, but must, consider any information "from the [state court] case files" in which facts may be found which will assist it in determining what conduct the defendant was charged with in state court. This factual inquiry is not to determine whether the defendant engaged in

conduct which was generic burglary, but to determine whether he was charged with and pleaded guilty to generic burglary:

> "In such a case, we believe it would be appropriate for the sentencing court to look to the conduct in respect to which the defendant was charged and pled guilty, not because the court may properly be interested (in this context) in the violent or nonviolent nature of that particular conduct, but because that conduct may indicate that the defendant and the government both believed that the generically violent crime ('building') rather than the generically non-violent crime ('vehicle') was at issue."

Shepard IV, 348 F3d at 312, quoting Harris, 964 F2d at 1236.

Applying its substitute for the Taylor categorical inquiry, the Court of Appeals held that the police reports and complaint applications, although not part of the charging document, proved that Petitioner had been charged with and pleaded guilty to generic burglary on at least three occasions. Petitioner had

> "been given a full opportunity (by the remand in Shepard II) to explain any circumstance surrounding the pleas that might defeat the natural inference that the pleas were to the crimes described in the case files. * * * [Petitioner] only said that he had not specifically admitted in open court to breaking into houses and that the underlying



police reports were not read to him at the plea hearings.

> Against this background, it is 'clearly erroneous' to find that Shepard did not plead guilty to at least three burglaries of buildings. Absent other evidence of peculiar circumstances, there is a compelling inference that the plea was to the complaint and that the complaint embodied the events described in the application or police report in the case file. If there were countervailing evidence to defeat the inference, we would defer to any reasonable interpretation of the conflict by the trier of fact. But there is no other evidence, nor is it easily imaginable that there would be.
>
> In Harris Judge Breyer referred to what the government and the defendant 'believed' to be the subject of the predicate plea; but he did not suggest that this required direct evidence of the parties' subjective states of mind. Harris, 964 F2d at 1236. His concern was with the nature of the proceedings; in upholding the enhancement Harris relied on objective evidence to characterize the pleas - namely, on police reports in the case file. Unimpeached, those filed carried the day in Harris; they do so here as well."

Shepard IV, 348 F3d at 314. The Court of Appeals concluded:

> "Judged by what Congress wanted, this case is not a close call. If this court's precedents have confused matters, that is our own fault but it is no reason to perpetuate confusion. Harris, with the reliability qualification adopted by Dueno as to the PSR (a point not litigated in Harris and irrelevant here), is the law of this circuit until the Supreme Court or an en banc panel rules otherwise. On remand, the district court must sentence Shepard under the Act and apply the mandatory minimum prescribed by

Congress."

Shepard IV, 348 F3d at 314-315.

On Petitioner's motion, the Court of Appeals has stayed its mandate to permit Petitioner to file this petition for a writ of certiorari. Appendix C.

**REASONS FOR GRANTING THE WRIT**

THE FIRST CIRCUIT HAS DECIDED AN IMPORTANT AND RECURRING ISSUE OF FEDERAL SENTENCING LAW THAT CONFLICTS DIRECTLY WITH AND UNDERMINES THIS COURT'S HOLDING IN TAYLOR V. UNITED STATES AND WITH RECENT RULINGS OF THE THIRD, FOURTH, FIFTH, SIXTH, EIGHTH NINTH AND TENTH CIRCUITS.

The First Circuit's ruling in this case announces its belief that the Supreme Court's decision in Taylor v. United States, 495 U.S. 575 (1990) provides insufficient guidance to resolve a recurring and widespread problem in the administration of the Armed Career Criminal Act:

> "Until the Supreme Court addresses the open issues, we must use our own reasoning, keeping faith with our own prior precedents."

Shepard IV, 348 F3d at 308. Instead of applying Taylor to Petitioner's case, the First Circuit established its own method of applying the ACCA, saying in conclusion:



> "If this court's precedents have confused matters, that is our own fault but it is no reason to perpetuate confusion. *Harris*...is the law of this circuit until the Supreme Court or an en banc panel rules otherwise."

Id, 348 F3d at 314. Taylor is the Court's only ruling interpreting the ACCA.

As will be seen, the Harris regime is fundamentally incompatible with Taylor, with the decisions of several other circuits and with the Taylor-guided rules of nearly all of the other circuits. The First Circuit's Shepard rulings present an appropriate vehicle by which the Court should address and resolve this pervasive problem concerning mandatory minimum sentences and federal judicial sentencing discretion.

The Armed Career Criminal Act ["ACCA"] imposes a fifteen year mandatory minimum sentence on persons convicted in federal court of being a felon in possession of a firearm who have been convicted of at least three qualifying violent felonies. Congress intended that this mandatory minimum sentence be uniformly and efficiently administered by the federal sentencing courts. In Taylor v. United States, 495 U.S. 575 (1990), the Court

established a comprehensive method for achieving these Congressional goals. First, violent felonies are defined in terms of generic elements so that the variations in state-to-state definitions do not unduly influence uniform administration. Second, a categorical method is employed to classify prior convictions as either generically violent felonies or not. The focus is on the elements of the crime of conviction as evidenced by the statute, the charging instrument and the jury instructions. Only prior violent felony convictions in which the factfinder necessarily adjudicated all of the elements of the generically defined crime can serve as predicates for imposition of the ACCA's mandatory minimum sentence.

But Taylor's categorical method is widely utilized in all the circuits in applying the various sentence enhancements based on prior convictions provided for in the United States Sentencing Guidelines and in immigration matters. The potential impact of the issues raised in this case is both substantial and very broad.

The problem addressed in Shepard II and



Shepard IV is how to classify state court convictions obtained by guilty plea where the state court records of adjudication do not readily disclose the information needed to make the Taylor-defined determination whether a particular state conviction can be used to impose an ACCA sentence enhancement. The First Circuit has devised a system of classifying prior felonies which focuses on the conduct underlying the state court conviction rather than on the elements of the generic crime actually adjudicated. Directly contrary to Taylor's specific prohibition, it requires an evidentiary hearing to determine whether the defendant and the government believed that the generic crime was at issue in the plea proceeding.

The Shepard approach undermines the Congressional goals of uniform application and ease of administration and will lead to sentencing hearings in which the federal court will be litigating the facts of old state crimes and reconstructing long-past state court guilty plea proceedings.

A. The Rulings In Shepard II and Shepard IV Conflict Irreconcilably With Taylor's Categorical Method Of Classifying Prior Felonies By Requiring Factual Inquiries And Evidentiary Hearings Into Whether The Defendant And The Government Both Believed That A Generically Violent Felony Was At Issue In The Guilty Plea.

In Shepard IV the First Circuit said that, because Taylor did not "explicitly rule out attention to other court-related documents or say just how guilty pleas should be parsed" it does not provide sufficient guidance to control the result in Shepard: "Until the Supreme Court addresses the open issues, we must use our own reasoning, keeping faith with our own prior precedents." 348 F3d at 312. From its two conflicting and divergent lines of authorities, it chose to follow the Harris line.

But Harris, as refined in Shepard II and Shepard IV conflicts intolerably with Taylor in every important aspect of both decisions. Taylor requires a determination of whether the factfinder necessarily found the defendant guilty of a crime which includes all of the elements of generic burglary; Shepard IV requires a determination of whether, in the guilty plea, the parties both believed that generic burglary was at issue.



Taylor commands a categorical method of application and prohibits inquiry into the facts underlying the prior conviction; Shepard IV requires an inquiry into the underlying facts. Taylor prohibits holding "mini-trials" to determine the applicability of the 924(e) enhancement; Shepard IV requires evidentiary hearings. Taylor strictly limits the sources of information which may be consulted; Shepard IV requires the sentencing court to consider "reliable" information found any document in the "court file."

Petitioner's case involves the exact issue decided in Taylor: was he convicted of a crime which included all of the elements of generic burglary? Taylor held that, where §942(e) enhancement is sought for a designated violent felony - burglary - the sentencing court must determine whether the defendant was necessarily convicted of a crime which included all the elements of generic burglary. 495 U.S. at 602. This is precisely the issue presented in Petitioner's case.

Taylor held that this determination begins

with a comparison of the elements of the crime defined in the statute of conviction with the elements of generic burglary: "unlawful or unprivileged entry into, or remaining in, a building or structure with intent to commit a crime." 495 U.S. at 599. Where, as in Petitioner's case, the statute of conviction includes these elements but is broader, the sentencing court may examine the indictment and jury instructions to determine whether the conviction necessarily resulted from an adjudication of each of the elements of generic burglary against the defendant. 495 U.S. at 602.

Petitioner was convicted under two statutes which penalized burglary of things other than buildings. The complaints at issue did not specifically charge burglary of a building. The record of conviction simply recorded a finding of guilty. No contemporaneous record of the guilty plea proceeding was provided. Nothing in the state court's record of its adjudicative actions established that Petitioner was necessarily convicted of generic burglary. The government



conceded this in the first sentencing hearing. Shepard I, 125 F. Supp.2d at 570 ["The government concedes that without the police reports or complaint applications it cannot determine the precise conduct to which Shepard actually pled guilty."]. Under Taylor's categorical analysis, none of these convictions could be used as enhancement predicates, and Judge Gertner twice made that finding.

But in Shepard II, the First Circuit held that, in these circumstances, the issue becomes whether the defendant and the government both believed that generic burglary was at issue in the guilty plea. 231 F3d at 69. It further held that the answer to this question is found by examining the facts of the underlying crime. This conflicts directly with Taylor's blanket injunction against exactly that inquiry. The First Circuit further held that the sentencing court is required to conduct an evidentiary hearing to determine the answer to its question. Shepard II, 231 F3d at 68-69. Finally, it held that the sentencing court must consider information about the underlying

conduct that is recorded in any document found in the state court's file, and may rely on it provided it determines that the information is sufficiently reliable. Id. This conflicts with Taylor's delimitation of the narrow range of documents [charging document, jury instructions, judgment of conviction] its categorical method allows to be consulted. Taylor, 495 U.S. at 602.

The First Circuit founded its ruling on the premise that Taylor provides inadequate guidance on how to address convictions based on guilty pleas. No other Court of Appeals has come to this conclusion. See, Shepard IV, 348 F3d at 312 n. 4 ["All twelve circuits that have addressed this issue have agreed that Taylor analysis applies after a guilty plea, even though Taylor only explicitly explained how to resolve ambiguity when the prior convictions were obtained after jury trials."]. It appears that the First Circuit's position rests in part on a dislike of the categorical method:

> "There is surely an air of make-believe about this case. No one, and this includes Shepard and the district court, has seriously disputed



> that Shepard in fact broke into half a dozen or more buildings and was consequently convicted upon pleas of guilty under the two Massachusetts statutes in question."

Shepard IV, 348 F3d at 311. The First Circuit held that its decision in United States v. Harris, 964 F2d 1234 (1st Cir. 1992) is therefore the controlling precedent until either an en banc decision or a Supreme Court decision overrules it. Oddly, Harris's formulation of the inquiry into what the parties to the guilty plea "believed" was at stake was part of a hypothetical ["One can, of course, easily imagine a more difficult case:...."]. 964 F2d at 1236. It was *obiter dictum* in the classic sense of that term. Black's Law Dictionary, 7th ed., 1100.

Harris did not involve burglary or any other §924(e) designated violent felony. At issue there was whether the defendant's convictions for assault and battery constituted a conviction for a violent felony under §924(e). 964 F2d at 1235. The Harris court disclaimed the need to consult the statutory elements or the charging document; it relied on information in the federal PSR stating that the

defendant had a knife, concluding:

> "the fact that the 'case files' showed that Harris had a knife suggests that the state charged Harris with, and that he pled guilty to, the harmful type of assault and battery against Hobson."

964 F2d at 1237.

Harris disdained the Taylor categorical method. The First Circuit in Shepard IV likewise avoided Taylor. It made no effort to reconcile its requirement that the sentencing court conduct a mini-trial to determine whether the facts allegedly underlying the charge suggest that, in the guilty plea proceedings, the defendant and the government both believed that the defendant was pleading to generic burglary with Taylor's categorical method. The lower court simply declared that Taylor had inadequately addressed the problem.

The First Circuit's conclusion in Shepard IV that in at least three of Shepard's state court guilty pleas the parties both believed that generic burglary was at issue does not establish, as required by Taylor, that the factfinder adjudicated all of the elements of generic burglary against him in those proceedings. If the matter was put to



Shepard in the boilerplate language of the statute or complaint and he pleaded guilty as charged, the "building" element was not necessarily adjudicated. United States v. Richardson, 313 F3d 121, 128 (3rd Cir. 2002); United States v. Barney, 955 F2d 635 640-641 (10th Cir. 1992); United States v. Parker, 5 F3d 1322, 1327 (9th Cir. 1993). The evidence before the sentencing judge did not establish that Shepard was "necessarily" convicted of a crime which included all of the elements of generic burglary.

This Court established with unmistakable clarity that this is the fundamental requirement of Taylor, applicable equally to jury trial and guilty plea adjudications. Shepard IV establishes an alternative system which discards the Congressional objectives of uniformity and ease of administration in favor of fact-intensive mini-trials designed to insure that the ACCA enhancement is applied as broadly as possible. 348 F3d at 311.

B. The First Circuit's Precedents Applying Taylor Consist Of Two Diametrically Opposed Lines Of Authority Which That Court Cannot Reconcile Without The Court's Assistance.

The First Circuit has developed two irreconcilable lines of authority, each purporting to employ the Taylor categorical analysis in determining whether a prior conviction qualifies for purposes of enhancing punishment as either a "violent felony" (ACCA - §924[e]) or a "crime of violence" (career offender - §4B1.1).

In cases where the prior conviction resulted from a guilty plea; the definition of the prior offense includes, in a single statute, both violent and non-violent versions; and, the charging document simply contains the boilerplate statutory formulation, the sentencing court is required to examine facts underlying the prior offense and make a determination from those facts as to whether "the defendant and the government both believed that the generically violent crime...rather than the generically non-violent...crime was at issue." United States v. Harris, 964 F.2d 1234, at 1236 (1st Cir. 1992); United States v. Dueno, 171 F.3d 3, 5 (1st Cir. 1999); United States v. Shepard (II), 231 F.3d 56, 67 (1st Cir. 2000); United States v. Shepard (IV), 348 F.3d 308, 313-314 (1st Cir. 2003). The facts that the sentencing court



must examine may be drawn from any sufficiently reliable source, such as the PSR's factual description of the prior offense (United States v. Harris, Id.; United States v. Bregnard, 951 F.2d 457, 460 [1st Cir. 1991]) or a police report contained in the state court file. (United States v. Dueno, Id.; Shepard II, at 67-68; Shepard IV, Id.). The fact source need not have played any role in the adjudication of the prior conviction and must be accepted as reliable by the sentencing court unless factually controverted by the defendant. (Bregnard; Harris; Shepard IV). The sentencing court has no discretion to apply Taylor strictly, looking only to such factual information as may be contained in the charging document. Shepard II and Shepard IV. In short, where the underlying facts show that the defendant was probably charged with a violent felony, the conviction will be used to enhance the punishment.

However, where the "otherwise" clause is the focus of the Taylor analysis, the First Circuit forbids inquiry into whether the defendant actually committed the offense in a violent manner, strictly adhering to Taylor's formal categorical approach.

United States v. Damon, 127 F.3d 139, 146 (1st Cir. 1997). The offense specific conduct/fact is considered only to the extent that it is set out in the charging document and then only in the context of the categorical analysis:

> . . . [E]ven where, as here, the category limned in the statute is an inexact semantic construct, warranting further inquiry, the task of classification continues to demand a categorical as opposed to a fact-sensitive approach. This means that if previous convictions for racketeering or racketeering conspiracy are in issue, a court seeking to ascertain the appropriateness of predicate offense treatment under *Taylor* principles must ask categorically oriented questions such as: "Racketeering by what means?" "Racketeering to what end?" And in answering these questions, the court should not plunge into the details of a particular defendant's conduct, but, rather, again in fidelity to *Taylor* principles, should merely assess the nature and object of the racketeering activity **as described in the indictment** and fleshed out in the jury instructions. (Emphasis added)

United States v. Winter, 22 F.3d 15, 19 (1st Cir. 1994)(Affirming the sentence imposed without recourse to the career offender guidelines).

In United States v. Damon, the First Circuit refused to consider the violent conduct actually involved in the defendant's prior conviction for criminal mischief, despite the authority to do so



apparently supplied by Harris. Rather, the Court of Appeals reversed the district court's determination that criminal mischief was a crime of violence, where that determination depended upon examination of the conduct underlying the conviction (concededly violent - arson):

> In light of *Taylor* and the changing definitions from the Sentencing Commission, we think the district court was precluded from looking so deeply into the nature of the predicate offense. That the court thought it permissible to do so under our decision in *Harris* was not unreasonable, but as we now clarify, was wrong.

127 F.3d 139 at 144.

The strict Taylor analysis was employed by the First Circuit to affirm enhancement under the career offender provisions of §4B1.1 based on a prior conviction for statutory rape where the only offense specific facts considered by the sentencing court were contained in the indictment for the prior offense. United States v. Meader, 118 F.3d 876, 883 (1st Cir. 1997) And in United States v. Sacko, 178 F.3d 1 (1st Cir. 1999), the Circuit disapproved of the district court's reliance on facts set out in the PSR to conclude that the defendant's prior conviction for statutory rape was

a violent felony requiring an enhanced ACCA punishment:

> Because statutory rape can encompass both violent and non-violent conduct, it was permissible for the district court to examine the indictment to learn that "George Sacko [age 21] ... did engage in sexual penetration, vaginal intercourse, with [Jane Doe], age 14 ...." [footnote omitted] The district court's investigation of the circumstances of the crime should have ended there. [footnote omitted] It was error for the district court to delve into the facts of Sacko's crime in order to determine whether his conviction was for a violent or a non-violent crime.

United States v. Sacko, supra, at 4-5.

This conflict within the First Circuit regarding the proper application of the Taylor categorical analysis must be resolved. The Harris line of authority, rather than Taylor, is now the engine that drives the analytical train in the violent felony - crime of violence enhancement determination. The Circuit, acting on its own, cannot resolve this conflict:

> In virtually all circumstances, newly-constituted panels with a circuit are bound by the holdings of prior panels. [Citations omitted] Given the force of this rule and its applicability here, I acknowledge that *United States v. Shepard, 231 F.3d 56, 66 (1st Cir. 2000)*, dictates the outcome of this appeal. I write separately, however, because I believe that Shepard, and cases like it,



> take impermissible liberties with the narrow exception envisioned in *Taylor v. United States, 495 U.S. 575, 602, 109 L.Ed.2d 607, 110 S.Ct. 2143 (1990)*, and, thus, undermine the integrity of the categorical approach favored by the Supreme Court for cases in which the predicate offenses are used to enhance defendants' sentences. Were we writing on a pristine page, I would hold that particularized inquiry of the type and kind approved in the majority opinion (inquiry which ranges well past the charging papers, jury instructions, and other formal accouterments of the predicate offense to a copy of a police report compiled by an investigating officer) to be beyond the limits contemplated by the Taylor Court. The page, however, is not pristine, and so I reluctantly concur in the judgment of the panel.

United States v. Delgado, 288 F.3d 49, 57 (1st Cir. 2002) (Selya, Circuit Judge concurring).

Mr. Shepard's Petition for Writ of Certiorari should be granted to clarify the proper application of the Taylor categorical analysis to convictions obtained by guilty pleas.

C. The Rulings In Shepard II and Shepard IV Conflict Irreconcilably With Recent Rulings By The Third, Fourth, Fifth, Sixth, Eighth, Ninth And Tenth Circuits Rejecting The Use Of Factual Inquiries In Applying Taylor's Categorical Method Of Classifying Prior Convictions And Adhering To Taylor's Definition Of The Issue.

The First Circuit rule requiring that the sentencing court conduct an evidentiary hearing to

determine whether a state court conviction was for an ACCA predicate where both the statute of conviction and the charging document are nongeneric is unique among the Circuits. Most circuits strictly limit the sentencing court's inquiry in these circumstances and restrict the sources of information correspondingly to state court documents which record or reflect adjudicatory actions from which the elements actually adjudicated can be readily determined. The general rule is that any dispute about the nature of the conviction must be resolved from the text of the charge and record of conviction, and not by holding an evidentiary hearing. See, United States v. Howze, 343 F3d 919, 921 (7th Cir. 2003); United States v. Parker, 5 F3d 1322, 1327 (9th Cir. 1993).

Shepard II and Shepard IV directly conflict with United States v. Bentley, 29 F3d 1073 (6th Cir. 1994), where the application of an ACCA enhancement turned on whether the defendant's guilty plea under an Ohio burglary statute which punished both burglary of structure and "trespass" on land with intent to commit a felony. 29 F3d at 1077-1078.



The indictment charged "trespass on the land or premises" and the judgment of conviction described the crime as breaking and entering. Id. The Sixth Circuit rejected the government's argument that the particular circumstances showed that Bentley actually did enter a structure rather than merely trespassing on land:

> "The similarity of the language of the indictment to the language of §2911.13(B) demonstrates that, had Bentley not pled guilty, the jury would not necessarily have had to find the elements of burglary in order to convict him. Under Taylor, then, we do not inquire into the specific circumstances of the past convictions, but rather we decide the issue based solely upon the statutory definitions of the prior offenses."

29 F3d at 1078. The First Circuit's Shepard holdings also conflict intolerably with the rules in the Third, Fourth, Fifth, Eighth, Ninth and Tenth Circuits in this regard. That is, no inquiry into specific circumstances, much less an evidentiary hearing, is permitted. United States v. Richardson, 313 F3d 121, 127-128 (3rd Cir. 2002); United States v. Kirksey, 138 F3d 120, 124-125 (4th Cir. 1998); United States v. Allen, 282 F3d 339, 343 (5th Cir. 2002); United States v. Taylor, 932

F2d 703, 707 (8th Cir.), cert. denied, 502 U.S. 888 (1991); United States v. Sparks, 265 F3d 825, 835 (9th Cir. 2001); United States v. Barney, 955 F2d 635, 640-641 (10th Cir. 1992).

Other circuits also observe strict limits on the sources of information the sentencing courts may rely upon in making the Taylor determination, both on analogy to those sources approved in Taylor and in recognition that such limits safeguard the Taylor injunction against delving into the facts underlying the prior convictions:

> "We read Taylor as allowing the sentencing court to consider only the statutory definition of the offense, the charging paper and jury instructions. Any different rule raises the possibility of mini-trials to determine the facts underlying a prior offense. Such an 'elaborate factfinding process regarding the defendant's prior offenses' is specifically barred by Taylor. 495 U.S. at 601, 110 S.Ct. at 2159."

United States v. Allen, 282 F3d at 343 [rejecting reliance on police report information which might have excluded conviction as ACCA predicate]; United States v. Richardson, 313 F3d at 128 ["The daunting practical difficulties and the due process and Sixth Amendment concerns that surface when a



sentencing court makes factual determinations concerning a defendant's prior convictions highlight the necessity of strict adherence to the categorical approach prescribed by Taylor."]. See also, United States v. Bentley, supra (6th Cir. 1994); United States v. Sparks, 265 F3d at 836 (9th Cir. 2001) [sources limited to indictment, judgment and "judicially noticeable facts"].

The First Circuit's Shepard IV ruling also conflicts with the rulings of the Third, Ninth and Tenth Circuits regarding the permissibility of basing an ACCA predicate determination solely on the content of the charging document. Shepard IV declares a "compelling inference" that the guilty plea to a nongeneric burglary complaint [as supplemented by a police report] is to the clarified generic burglary charge. 348 F3d at 314. In United States v. Richardson, 313 F3d at 127-128, the Third Circuit said: "[A]n enhancement cannot be based solely on an allegation in the charging document when the conviction for the charged offense or offenses could have been obtained without that allegation having been proved." The

same rule prevails in the Ninth Circuit. United States v. Parker, 5 F3d 1322, 1327 (9th Cir. 1993).

The factual inquiry required by the First Circuit conflicts intolerably with the inquiry conducted in all other circuits. Where the statute of conviction and the charging instrument charge nongeneric burglary in a guilty plea case, the First Circuit's Harris inquiry is whether both parties believed that generic burglary was at issue in the plea. The other circuits invariably focus on whether the records documenting the conviction establish that all the elements of generic burglary were adjudicated. The Tenth Circuit's statement is typical:

> "We join (Circuits Seven, Eight and Nine)...in holding that where enhancement is sought on the basis of a conviction obtained through a guilty plea, the sentencing court may look to the underlying indictment or information and the text of the guilty plea to determine whether the defendant was charged with and admitted conduct which falls without question into the ambit of Taylor's generic definition."

United States v. Barney, 955 F2d at 639. No other court has abandoned Taylor's inquiry for the First Circuit's formulation.



Certiorari should be granted to resolve these intolerable conflicts between the First Circuit and her sister Circuits.

## CONCLUSION

The First Circuit believes that this Court's ruling in Taylor provides inadequate guidance on how to classify state court convictions under the ACCA when they rest on guilty pleas to nongeneric charges brought under nongeneric statutes. It has devised its own system which is fundamentally at odds with Taylor's categorical method of classification as applied in at least the Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits, and with its own application of Taylor's method in its career offender and USSG §4B1.2 line of cases. The issues presented here substantially impact the uniform and efficient administration of the ACCA and other sentence enhancement provisions nationally and within the First Circuit.

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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**APPENDIX A**

United States v.Shepard (IV),
348 F.3d 308 (1st Cir. 2003)

United States v. Shepard (III),
181 F.Supp.2d 14 (D. Mass. 2002)

United States v. Shepard (II),
231 F.3d 56 (1st Cir. 2000)

United States v. Shepard (I),
125 F.Supp.2d 562 (D.Mass. 2000)

UNITED STATES OF AMERICA, Appellant, v. REGINALD SHEPARD,Defendant, Appellee.
No. 02-1216

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

348 F.3d 308; 2003 U.S. App. LEXIS 22584

November 3, 2003, Decided

PRIOR HISTORY: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Nancy Gertner, U.S. District Judge. *United States v. Shepard, 181 F. Supp. 2d 14, 2002 U.S. Dist. LEXIS 1280 (D. Mass., 2002)*

DISPOSITION: Vacated and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant pled guilty to violating the federal statute prohibiting a felon from possessing a firearm, *18 U.S.C.S. § 922*(g)(1). Plaintiff government appealed the ruling of the United States District Court for the District of Massachusetts that declined to apply the Armed Career Criminal Act (Act) to defendant. The sentence was reversed and remanded. On remand, the district court again refused to apply the Act. The government appealed.

OVERVIEW: At issue on appeal was whether defendant's previous state court convictions for breaking and entering qualified as violent felonies under the Act. In each of the state cases, the complaint merely charged defendant in the boilerplate language of the statutes, leaving it unclear just what kind of structure defendant had entered. Thus, the complaints alone did not reveal whether defendant had broken into a building or some lesser enclosure such as a car or boat. The court of appeals found that it was "clearly erroneous" to find that defendant did not plead guilty to at least three burglaries of buildings. Absent other evidence of peculiar circumstances, there was a compelling inference that the plea was to the complaint and that the complaint embodied the events described in the application or police report in the case file. If there were countervailing evidence to defeat the inference, the court would defer to any reasonable interpretation of the conflict by the trier of fact. But there was no other evidence, nor was it easily imaginable that there would be.

OUTCOME: The sentence of the district court is vacated and the matter remanded for re-sentencing in conformity with this decision.

CORE TERMS: burglary, generic, pled guilty, breaking and entering, sentence, violent felonies, guilty pleas, presentence, indictment, convicted, charging, sentencing, predicate, boat, information contained, crime of violence, minimum sentence, criminal conduct, violent felony, career, prescribed, violence, happened, burglar, embrace, venue, label, felon, plea hearing, mandatory minimum

LexisNexis (TM) HEADNOTES - Core Concepts:

Criminal Law & Procedure: Sentencing: Criminal History: Prior Felonies
Criminal Law & Procedure: Sentencing: Sentencing Ranges
[HN1] Under the amended Armed Career Criminal Act, *18 U.S.C.S. § 924*(e), a 15-year mandatory minimum sentence is required for anyone convicted as a felon in possession of a firearm who has three or more prior convictions for a "violent felony" or "serious drug offense."

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass
Criminal Law & Procedure: Sentencing: Criminal History: Prior Felonies
Criminal Law & Procedure: Sentencing: Sentencing Ranges
[HN2] Under the Armed Career Criminal Act, the phrase "violent felony" is not limited to crimes in which violence actually occurs; instead, the phrase is defined to include inter alia any crime punishable by imprisonment for a term exceeding one year that is burglary, arson or extortion or otherwise involves conduct that presents a serious potential risk of physical injury to another. *18 U.S.C.S. § 924*(e)(2)(B)(ii). The United States Supreme Court holds that Congress intended "burglary" to mean any crime under state law, however denominated, that incorporated the elements of what the Supreme Court



describes as "generic burglary"--unlawful entry into a building or other structure, with intent to commit a crime.

Criminal Law & Procedure: Accusatory Instruments: Informations
Criminal Law & Procedure: Accusatory Instruments: Complaints
[HN3] The "complaint" under Massachusetts criminal procedure is the final step in the charging process, roughly equivalent to a federal information. Issued by a magistrate, the complaint is based on a complaint application normally filed by a police officer and likely to incorporate or be accompanied by a police report. The application is customarily sworn and is automatically given to defendants at their arraignments. *Mass. Gen. Laws ch. 276, § 22* (2000). Courts in Massachusetts can presume that defendants know the information contained in police reports.

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass
[HN4] With regard to the offense of burglary, where the statute embraces two different crimes or categories of criminal conduct, the defendant will be deemed guilty of a violent felony if one of the two corresponds to generic burglary and that is the crime of conviction in the particular case.

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass
Criminal Law & Procedure: Sentencing: Sentencing Ranges
[HN5] Under Taylor, a burglary conviction by a jury would count as a crime of violence under the Armed Career Criminal Act if the indictment and instructions made clear that the burglary was of a house. The same would be true if instead the defendant pled guilty to such indictment naming a house as the burgled location. It would also be true even if the indictment were silent as to the venue so long as the case files showed that the plea was to burglary of a house.

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass
Criminal Law & Procedure: Sentencing: Criminal History: Prior Felonies
Criminal Law & Procedure: Sentencing: Sentencing Ranges
[HN6] With regard to whether a prior conviction for burglary qualifies as a violent felony for purposes of the Armed Career Criminal Act, the United States Court of Appeals for the First Circuit believes it is appropriate for the sentencing court to look to the conduct in respect to which the defendant was charged and pled guilty, not because the court may properly be interested (in this context) in the violent or non-violent nature of that particular conduct, but because that conduct may indicate that the defendant and the government both believed that the generically violent crime (building), rather than the generically non-violent crime (vehicle) was at issue.

Criminal Law & Procedure: Sentencing: Criminal History: Prior Felonies
Criminal Law & Procedure: Sentencing: Sentencing Ranges
[HN7] With regard to whether a prior conviction qualifies as a violent felony for purposes of the Armed Career Criminal Act, the United States Court of Appeals for the First Circuit has approved resort to pre-sentence reports but only to determine the character of the criminal offense for which the defendant was convicted (not whether violence was or was not used on the particular occasion), where that determination cannot be made from the statutory language itself or from the charging documents, and only where the report was sufficiently reliable on this issue.

COUNSEL: Cynthia A. Young, Assistant United States Attorney, with whom Michael J. Sullivan, United States Attorney, was on brief for appellant.

Linda J. Thompson, with whom John M. Thompson and Thompson & Thompson, P.C. was on brief for appellee.

JUDGES: Before Boudin, Chief Judge, Torruella and Lipez, Circuit Judges.

OPINIONBY: BOUDIN

OPINION: **[*309]** BOUDIN, Chief Judge. [HN1] Under the amended Armed Career Criminal Act ("the Act"), *18 U.S.C. § 924(e) (2000)*, a 15-year mandatory minimum sentence is required for anyone convicted as a felon in possession of a firearm who has three or more prior convictions for a "violent felony" or "serious drug offense." This appeal by the government concerns the proper application of these labels to Reginald Shepard's prior guilty pleas under state burglary statutes. The issue is a recurring one.

On March 3, 1999, Shepard pled guilty to a charge of violating the federal statute prohibiting a felon from possessing a firearm, *18 U.S.C. § 922(g)(1) (2000)*. Shepard had in fact sold a Glock 17, 9 mm pistol**[**2]** and ammunition to an undercover federal agent at South Station in Boston. Shepard already had on his record dozens of prior state convictions, including eleven for breaking and entering. The government sought to have Shepard sentenced as an armed career criminal, arguing

that at least five of these breaking and entering convictions were violent felonies under the Act.

[HN2] Under the Act, the phrase "violent felony" is not limited to crimes in which violence actually occurs; instead, the phrase is defined to include inter alia "any crime punishable by imprisonment for a term exceeding one year" that "is burglary, arson or extortion . . . or otherwise involves conduct that presents a serious potential risk of physical injury to another." *18 U.S.C. § 924(e)(2)(B)(ii)*. In *Taylor v. United States, 495 U.S. 575, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990)*, the Supreme Court held that Congress intended "burglary" to mean any crime under state law, however denominated, that incorporated the elements of what the Court described as "generic burglary"--unlawful entry into "a building or other structure, with intent to commit a crime." *Id. at 598-99.*[**3]

At Shepard's initial sentencing, the five convictions at issue were under one or the other of two Massachusetts statutes that forbid breaking and entering a "building," "ship," "vessel" or "vehicle" with intent to commit a felony. n1 In each of the state cases, the complaint merely charged Shepard in the boilerplate language of the statutes, leaving it unclear just what kind of structure Shepard had entered. Thus, the complaints alone did not reveal whether Shepard had broken into a building or some lesser enclosure such as a car or boat.

----------Footnotes----------

n1 One of the statutes says "motor vehicle" instead of "vehicle" but otherwise they are similar; the difference between them is that one statute, *Mass. Gen. Laws ch. 266, § 16 (2000)*, is directed to breaking and entering by night and carries a 20 year maximum, while the other, *ch. 266, § 18*, has only a 10 year maximum and embraces breaking and entering during the day as well as non-forcible entry into a dwelling at night.

----------End Footnotes----------

[HN3] The "complaint" under Massachusetts[**4] procedure is the final step in the charging process, roughly equivalent to a federal information. 1 Massachusetts Criminal Practice § 4.1-4.2 (1998). Issued by a magistrate, the complaint is based on a [*310] complaint application normally filed by a police officer and likely to incorporate or be accompanied by a police report. Id. The application is customarily sworn and is automatically given to defendants at their arraignments. *Mass. Gen. Laws ch. 276, § 22 (2000)*; Super. Ct. Standing Order 2-86; 1 Massachusetts Criminal Practice § 4.2, 16.5(C). Courts in Massachusetts can presume that defendants know the information contained in police reports. See *Commonwealth v. Brown, 51 Mass. App. Ct. 702, 748 N.E.2d 972, 981 (Mass. App. Ct. 2001)*.

Forewarned by an earlier decision of this court, *United States v. Dueno, 171 F.3d 3 (1st Cir. 1999)*, the government secured the state court files from Shepard's earlier convictions, presented certified copies, and argued that the complaint applications and police reports contained in the state court files showed that Shepard's prior convictions were for entries into buildings[**5] and so constituted generic burglaries under Taylor. Taking these documents at face value, they showed (with varying degrees of elaboration) the following as to the charges that had led to Shepard's guilty pleas:

May 1989. Break in at 30 Harlem St. in Boston; defendant discovered by an inhabitant in the pantry. March 1991. Entry into 550 Arsenal St in Watertown; defendant in back room of store. July 1991. Entry into 258 Norwell St. in Boston; defendant found in hallway with property taken from a broken-into apartment. February 1994. Attempted entry into 145 Gallivan Blvd; defendant found with arms through broken glass window. n2

----------Footnotes----------

n2 At the first sentencing hearing the government argued that Shepard's conviction for an April 1989 break in to Crispus Attucks Children's Center building should also be counted as generic burglary. Since the government did not provide the police reports or complaint applications for this conviction, only the PSR, it simplifies our analysis if we ignore this conviction for the present case.

----------End Footnotes----------

[**6]



The district court ruled that the complaint applications and police reports could not be considered and declined to sentence Shepard under the Act, imposing instead a sentence of 46 months (which included a two-level upward departure). *United States v. Shepard, 125 F. Supp. 2d 562, 572 (D. Mass. 2000)* ("Shepard I"). On the government's appeal, this court reversed, ruling that there was no "absolute bar" to consideration of police reports and complaint applications; the question, said the panel, was whether, in the contemporaneous understanding of the state and the defendant, Shepard had pled guilty in the breaking and entering cases to entry of a building (rather than, say, a motor vehicle). *United States v. Shepard, 231 F.3d 56, 67 (1st Cir. 2000)* ("Shepard II"), cert. denied *534 U.S. 829, 151 L. Ed. 2d 37, 122 S. Ct. 72 (2001)*.

On remand, the government filed additional complaint applications or police reports from state court files evidencing two additional convictions. According to these documents, one conviction was for a February 1981 break in to the Jamaica Plain High School gymnasium and the theft of property; the[**7] other was an attempted break in at 446 Shawmut Avenue where Shepard was found on the fire escape next to a window that had been pried open with a knife.

Shepard submitted an affidavit saying essentially the same thing as to all of the alleged predicate charges:

I am sure that, at the time of [the state court plea hearing], the judge did not read this Incident report to me and did not ask me whether or not the information [*311] contained in the incident report was true. I did not admit the truth of the information contained in the Incident report as part of my plea and I have never admitted in court that the facts alleged in the reports are true.

After these submissions, the district court imposed the same sentence as before. *United States v. Shepard, 181 F. Supp. 2d 14, 18 (D. Mass. 2002)* ("Shepard III"). The court emphasized Shepard's affidavit denials that he had ever admitted in court the underlying facts of the crimes and concluded that "the police reports did not provide reliable evidence on the central question, what did the defendant plead to in the state court?" *Id. at 17, 19-20.* The government again appeals, arguing[**8] that complaint applications and police reports establish that Shepard pled guilty to breaking into buildings.

There is surely an air of make-believe about this case. No one, and this includes Shepard and the district court, has seriously disputed that Shepard in fact broke into half a dozen or more buildings and was consequently convicted upon pleas of guilty under the two Massachusetts statutes in question. Further, his string of convictions--which the district court described as "an 18-year crime spree," *Shepard I, 125 F. Supp. 2d at 565*--shows that he is just the kind of burglar whom Congress had in mind in adopting the tough 15 year minimum sentence for armed career criminals. Taylor recounts in numbing detail the legislative history showing Congress' aim to apply the Act to repeat burglars later convicted of a gun crime. *Taylor, 495 U.S. at 581-90.*

Congress' rationale was that a large percentage of all crimes are committed by repeat offenders; that many of these crimes have at least a potential for violence (e.g., the burglar who encounters a resident in the house being burgled); that after a series of these crimes, the defendant[**9] is fairly described as a repeat offender; and that when a repeat offender then also commits a federal gun crime, it is time for that felon to serve a long prescribed minimum sentence. *Taylor, 495 U.S. at 581-88.* Whatever the force of the theory, there is no doubt that Congress intended that it be implemented.

Yet Taylor, while construing the term "burglary" broadly (based on common usage rather than common law), narrowed the Act dramatically in another respect. Partly for practical reasons of administration, Taylor forbade a de novo inquiry by the sentencing court into what conduct the defendant actually engaged in incident to the predicate offense, and focused instead on whether the crime of conviction was necessarily a generic burglary (or some other crime of violence). *Taylor, 495 U.S. at 599-602.* Admittedly, this simplifies administration if the state statute describes generic burglary and nothing else.

The problem--which Taylor recognized and addressed--is that state burglary statutes are often drafted to embrace both conduct that does constitute generic burglary and conduct that does not (e.g., building versus[**10] vehicle n3 ). *Taylor, 495 [*312] U.S. at 599-602.* Taylor makes clear that [HN4] where (as here) the statute embraces two different crimes or categories of criminal conduct, the defendant will be deemed guilty of a violent felony if one of the two corresponds to generic burglary and that is the crime of conviction in the particular case. *Id. at 602.*

----------Footnotes----------

n3 Breaking and entering a vehicle is not generic burglary under Taylor's definition. *495 U.S. at 598-99*. Our circuit has never squarely decided whether burglary of vehicles or boats might still be grounds for enhancement under the Act because they "involve[] conduct that presents a serious potential risk of physical injury to another." *18 U.S.C. § 924(e)(2)(B)(ii)*, although prior dicta have suggested that they do not qualify as violent felonies, see, e.g., *Shepard II, 231 F.3d at 59*. Since the parties do not dispute this point, we assume it for present purposes, reserving always the peculiar problems posed by houseboats and camper vans, see *United States v. Peterson, 233 F.3d 101, 110 (1st Cir. 2000)*; *United States v. Sweeten, 933 F.2d 765, 770-72 (9th Cir. 1991)*.

----------End Footnotes----------

[**11]

But how can one tell whether generic burglary was the crime of conviction if one does not look at what actually happened at the scene of the crime? Taylor said that the sentencing court can still look at the charging papers and jury instructions, which together may well identify the crime of conviction. *Taylor, 495 U.S. at 602*. The Court did not explicitly rule out attention to other court-related documents or say just how guilty pleas should be parsed. Until the Supreme Court addresses the open issues, we must use our own reasoning, keeping faith with our own prior precedents.

Let us start with basics. [HN5] Under Taylor, a burglary conviction by a jury would count as a crime of violence under the Act if the indictment and instructions made clear that the burglary was of a house. *Taylor, 495 U.S. at 602*. The same would be true if instead the defendant pled guilty to such indictment naming a house as the burgled location. n4 It would also be true, as this court held in *United States v. Harris, 964 F.2d 1234 (1st Cir. 1992)*, even if the indictment were silent as to the venue so long as the case files showed that the plea was to[**12] burglary of a house. *Id. at 1236-37*; accord *United States v. Coleman, 158 F.3d 199, 202-03 (4th Cir. 1998)*.

----------Footnotes----------

n4 All twelve circuits that have addressed the issue have agreed that Taylor analysis applies after a guilty plea, even though Taylor only explicitly explained how to resolve ambiguity when the prior convictions were obtained after jury trials. See *United States v. Adams, 91 F.3d 114, 116 (11th Cir. 1996)* , cert. denied *519 U.S. 1047, 136 L. Ed. 2d 546, 117 S. Ct. 623 (1996)* (collecting and joining decisions from the 1st, 5th, 6th, 7th, 8th, 9th, and 10th *Circuits)*; *United States v. Hernandez, 218 F.3d 272, 278 (3rd Cir. 2000)*; *United States v. Hill, 327 U.S. App. D.C. 402, 131 F.3d 1056, 1064 (D.C. Cir. 1997)* (applying parallel U.S.S.G. career criminal provision); *United States v. Palmer, 68 F.3d 52, 59 (2nd Cir. 1995)*; *United States v. Cook, 26 F.3d 507, 509* & n.5 (4th Cir. 1994).

----------End Footnotes----------

[**13]

In Harris, Judge (now Justice) Breyer discussed the exact situation before us: a defendant who has pled guilty to violating a broadly worded statute that included both situations that would and situations that would arguably not be violent felonies. *Harris, 964 F.2d at 1236-37*. As with Shepard's complaint, the indictment in Harris repeated the statutory boilerplate, leaving it unclear what category of offense was at issue. *Id.* The Harris court explained:

> In such a case, we [HN6] believe it would be appropriate for the sentencing court to look to the conduct in respect to which the defendant was charged and pled guilty, not because the court may properly be interested (in this context) in the violent or non-violent nature of that particular conduct, but because that conduct may indicate that the defendant and the government both believed that the generically violent crime ("building"), rather than the generically non-violent crime ("vehicle") was at issue.
>
> *Id. at 1236.*

Judge Breyer then described the presentence report's summary of the case files from Harris's state convictions; these files (just like the complaint [**14]applications and police reports in Shepard's case) made clear that the crimes were violent felonies-- [*313] in Harris, that the defendant had twice physically assaulted the victim. *Harris, 964 F.2d at 1236-37*. On this basis alone, this court concluded that Harris's prior convictions were properly treated as violent felonies and (together with a third crime of violence) justified the 15 year minimum sentence prescribed by the Act. *Id. at 1237*.

In *United States v. Dueno, 171 F.3d 3 (1st Cir. 1999)*, this court arguably limited Harris in one respect. In Dueno, the government sought to characterize the predicate guilty pleas based not on the original police reports in the state court case files but rather upon the federal presentence report's description of the underlying criminal conduct. *Id. at 6-7*. This had also been true in Harris but there no one had contested the reliance on the PSR. In Dueno, the court--though describing the issue as a close one-- declined to allow the PSR alone to resolve the issue. *Id. at 7*.

The Dueno court endorsed Harris's general approach--as it had[**15] to do absent en banc review, see *Irving v. United States, 162 F.3d 154, 160 (1st Cir. 1998)* (en banc), cert. denied *528 U.S. 812, 145 L. Ed. 2d 41, 120 S. Ct. 47 (1999)*--but it noted that not a single document from the original state court case files had been submitted for consideration, nor was there any other "account of what took place at Dueno's plea hearing." *Dueno, 171 F.3d at 7*. Absent any indication that the PSR accurately repeated the information from the original state court documents, the Dueno court rejected reliance on the PSR's description of the criminal conduct to rescue an enhanced sentence whose primary ground was admittedly in error. Id.

Our en banc court sought to clarify our stance on presentence reports in a published order released shortly after Dueno. n5 We explained:

> Our cases [HN7] have approved resort to pre-sentence reports but only to determine the character of the criminal offense for which the defendant was convicted (not whether violence was or was not used on the particular occasion) [citing Harris], where that determination cannot be made from the statutory language[**16] itself or from the charging documents, and only where the report was sufficiently reliable on this issue [citing Dueno].

*United States v. Sacko, 178 F.3d 1, 7-8 (1st Cir. 1999)* (en banc order, June 16, 1999). While this order does not spell out what makes a PSR "reliable," and other circuits are split on this issue, compare *United States v. Adams, 91 F.3d 114, 116 (11th Cir. 1996)* (relying on PSR), with *United States v. Potter, 895 F.2d 1231, 1238 (9th Cir. 1990)*, cert. denied *497 U.S. 1008, 111 L. Ed. 2d 757, 110 S. Ct. 3247 (1990)* (generally rejecting PSR), it does make clear two things: first, presentence reports can be used in some situations; second, Harris remains solid precedent in this circuit even after Dueno.

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n5 This order was in response to the government's motion for a rehearing en banc in *United States v. Sacko, 178 F.3d 1, 7 (1st Cir. 1999)*. Sacko was released three days before Dueno and was arguably in tension with the later opinion. Since the Sacko panel released an erratum altering the language in Sacko, our court denied the petition for rehearing, but took the opportunity "to make clear the en banc court's view as to what is now settled law in this circuit." *Sacko, 178 F.3d at 7*.

----------End Footnotes----------

[**17]

In Shepard's case the reliability of PSR descriptions is not even an issue, for the government secured the original state court case files from six of Shepard's prior convictions, found in them the complaint applications and police reports that had prompted the complaints, and made the latter available to the federal sentencing [*314] court (and so also to us). And Shepard has been given a full opportunity (by the remand in Shepard II) to explain any circumstance surrounding the pleas that might defeat the natural inference that the pleas were to the crimes described in the case files.

Of course, it is barely possible that someone in Shepard's position might have pled guilty, not to the charge that underlay the complaint (namely, burglary of a building), but to the burgling of some other venue such as a boat arguably not within the definition of generic burglary. Conceivably, at the plea hearing someone might have explained in mitigation that 258 Norwell Street was actually a boat dock address or, in a different instance, that Shepard's target was not the Jamaica Plain High School gymnasium but merely a car parked in front.

This, we say, is conceivable but highly unlikely; and it[**18] is even less likely--to the point of nearly impossible--that it or anything like it happened for most of Shepard's predicate pleas, and that the police reports were mistaken as to venue for four or more of the six

crimes. Nor on remand did Shepard offer any evidence that this had happened; he said only that he had not specifically admitted in open court to breaking into houses and that the underlying police reports were not read to him at the plea hearings.

Against this background, it is "clearly erroneous" to find that Shepard did not plead guilty to at least three burglaries of buildings. Absent other evidence of peculiar circumstances, there is a compelling inference that the plea was to the complaint and that the complaint embodied the events described in the application or police report in the case file. If there were countervailing evidence to defeat the inference, we would defer to any reasonable interpretation of the conflict by the trier of fact. But there is no other evidence, nor is it easily imaginable that there would be.

In Harris Judge Breyer referred to what the government and defendant "believed" to be the subject of the predicate plea; but he did not suggest **[**19]**that this required direct evidence of the parties' subjective states of mind. *Harris, 964 F.2d at 1236*. His concern was with the nature of the proceedings: in upholding the enhancement Harris relied on objective evidence to characterize the pleas--namely, on police reports in the case file. Unimpeached, those files carried the day in Harris; they do so here as well.

Our view accords with that of the Fourth Circuit in *Coleman, 158 F.3d at 202-03*. In Coleman, the en banc court approved consideration of the "statement of charges" filed by a "complaining witness"--Maryland's equivalent of Massachusetts's complaint application--in order to determine whether the predicate crime qualified under the Act. *Id.* While the Coleman court mentioned that this document was formally considered part of the "charging papers" under Maryland law, we do not see how the label given to the document should make a difference, particularly in light of Taylor's forceful rejection of the use of state labels. *Taylor, 495 U.S. at 590-92*.

Judged by what Congress wanted, this case is not a close call. If this court's precedents have confused**[**20]** matters, that is our own fault but it is no reason to perpetuate confusion. *Harris*, with the reliability qualification adopted by *Dueno* as to the PSR (a point not litigated in Harris and irrelevant here), is the law of this circuit until the Supreme Court or an en banc panel rules otherwise. n6 On remand, the **[*315]** district court must sentence Shepard under the Act and apply the mandatory minimum prescribed by Congress.

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n6 In addition to the tension between the two decisions, our own prior remand in Shepard II may further have complicated matters by not calling attention to the en banc order in Sacko. In all events, none of this confusion is the fault of the district judge who sought conscientiously to carry out this court's earlier mandate.

----------End Footnotes----------

The sentence of the district court is vacated and the matter remanded for re-sentencing in conformity with this decision.

UNITED STATES OF AMERICA v. REGINALD SHEPARD, Defendant.

Crim. No. 98-10262-NG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

181 F. Supp. 2d 14; 2002 U.S. Dist. LEXIS 1280

January 23, 2002, Decided

SUBSEQUENT HISTORY: *Vacated by, Remanded by United States v. Shepard, 2003 U.S. App. LEXIS 22584* (1st Cir. Mass., Nov. 3, 2003)
PRIOR HISTORY: *United States v. Shepard, 125 F. Supp. 2d 562, 2000 U.S. Dist. LEXIS 20106 (D. Mass. 2000) United States v. Shepard, 125 F. Supp. 2d 562, 2000 U.S. Dist. LEXIS 20106* (D. Mass., 2000)
DISPOSITION: On remand original sentence re-imposed.

CORE TERMS: colloquy, police report, breaking, pled, sentence, felony, sentencing, predicate, convicted, charging, presentence report, pled guilty, enhancement, vessel, burglary, violent, ship, criminal history, intent to commit, violent crime, categorical, departure, reliable, process, door, guilty plea, proceeding, generic, plainly, plea agreement

COUNSEL: **[**1]** For REGINALD SHEPARD, Defendant: Linda J. Thompson, Jacobson & Thompson, P.C., Springfield, MA.

U. S. Attorneys: Nadine Pellegrini, United States Attorney's Office, Boston, MA.

JUDGES: NANCY GERTNER, U.S.D.J.

OPINIONBY: NANCY GERTNER

OPINION: **[*15]** MEMORANDUM RE: RE-SENTENCING

January 23, 2002

On July 14, 1999, I sentenced Reginald Shepard to 46 months in prison after he pled guilty to a violation of *18 U.S.C. § 922*(g) (felon in possession of a firearm). n1 With a criminal history of VI, the presentence report ("PSR") calculated Mr. Shepard's sentencing guideline range to be 30 to 37 months.

n1 Under *18 U.S.C. § 922*(g)(1) ("§ 922 (g)(1)"), it is unlawful for a person who has been convicted previously of a felony to possess a firearm.

The government moved for two enhancements: First, it sought an enhancement to a 15 year mandatory minimum term under the Armed Career Criminal Act ("ACCA") *18 U.S.C. § 924*(e) **[*16]** ("§ 924(e)"). n2 I rejected that enhancement **[**2]** on the grounds that Mr. Shepard's conviction history did not meet the statutory requirements. I concluded that on the record before me, I could not determine that he had at least "three prior convictions . . . for a violent felony or serious drug offense" within the meaning of the statute. *18 U.S.C. § 924*(e) and U.S.S.G. § 4B1.4.

n2 A defendant convicted for a violation of § 922(g)(1) is subject to the sentence-enhancement provision at issue, § 924(e):

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court . . . for a violent felony or a serious drug offense, or both . . . such person shall be fined not more than $25,000 and imprisoned not less than fifteen years. . . .

(2) As used in this subsection -- . . .

(B) the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year . . . that --

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

**[**3]**

Shepard was charged with the crime of breaking and entering under *Mass. Gen. L. Ch. 266 § 16*, which outlines a generic breaking and entering offense,

including offenses that qualify as predicate convictions under the ACCA, *Taylor v. United States, 495 U.S. 575, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990)*, namely, breaking and entering into a building, and offenses that do not, namely breaking and entering a car or vessel. While police reports attached to the applications for state criminal complaints suggested that at least five of Mr. Shepard's convictions involved a building, those details were not reflected in the complaints themselves. Rather, the complaints tracked the boilerplate language of the statute. Mr. Shepard pled guilty to the complaints.

After ruling against applying the ACCA enhancement, I invited the government to move for an upward departure on the ground that the criminal history score of VI did not adequately reflect the seriousness of Mr. Shepard's criminal history. Since it was clear that Mr. Shepard's record justified an upward departure, I granted the motion.

The sentence which I imposed represented a two level upward departure, from a level **[**4]** 12 base offense level to a level 14, with 46 months being the highest sentence available in the range. My reasons are recorded in *United States v. Shepard, 125 F. Supp. 2d 562 (2000)* ("Shepard I").

The government appealed. The decision was then vacated and remanded in *United States v. Shepard, 231 F.3d 56 (1st Cir. 2000)*("Shepard II"). The First Circuit found that I had erred in two respects: First, Shepard I suggested that the trial court could never use police reports to determine the crime to which the defendant had pled (and therefore, the charge of which he was convicted). Second, Shepard I implied that in order for me to find that the defendant had admitted to the predicate offenses, at either the state plea colloquy or during the federal sentencing, the defendant had to admit to the offense explicitly ("in the sense of yes, I struck the victim in the face,'") *Shepard II, 231 F.2d at 66.* n3

n3 It was not my intent in Shepard I to imply either position although the decision could be fairly read to suggest these interpretations. I noted repeatedly that the ACCA's emphasis on convictions reflects a concern that facts which determine ACCA status had to have been litigated and subjected to the formalities of the criminal justice process before a defendant's sentence can be dramatically increased. While I confess to overstatement, what I meant by "the formalities" of the criminal justice process was that the ACCA's focus was on what the defendant had pled to or been convicted of, and not what he had actually done. (I noted that what the Taylor court described as the "categorical" approach, I was calling "focusing on the formalities of the record." *Shepard I, 125 F. Supp. 2d at 568.)*

**[**5]**

**[*17]** The court directed the consideration of police reports and complaint applications to determine if they "constituted sufficiently reliable evidence of the government and the defendant's shared belief that the defendant was pleading guilty to the unlawful entry of a building." *Shepard II, 231 F.3d at 70.* The court also directed a review of the defendant's submissions at sentencing to evaluate whether, under the circumstances, the defendant admitted that he had pled to the predicate offenses. *Id. at 66.*

At the first hearing on remand, I addressed two issues: First, what was the question to be answered on remand? Was it -- what did Mr. Shepard plead to? Or, was it -- what did Mr. Shepard do to provoke the charges? Both parties agreed that the answer was: What did Mr. Shepard plead to on those prior occasions? Second, with respect to that question, who bears the burden of proof? With some qualifications noted below, both parties agreed that the government bears the burden of proof.

I also considered on remand two types of questions raised by the court -- those which related to whether the police report was made part of, referred to, or used in any **[**6]** way in the plea colloquy n4 and those which related to whether Mr. Shepard admitted that he had pled to the predicate offenses. n5

n4 The Court noted: ". . . Did the court taking the guilty plea have before it the police reports and complaint applications described in the PSR, or any other documents describing the defendant's conduct? Where did the police reports come from? What took place at Shepard's plea hearings? More specifically . . . did the defendant provide anything at his plea hearings to contest the facts set forth in the police reports and complaint applications, thereby suggesting that the government and the defendant did not share an understanding that he was pleading guilty to an offense that had the elements of a generically violent crime?" *Shepard II, 231 F.3d at 68.*

n5 The Court noted: "Shepard's objections to the government's police reports and complaint applications might focus, for example, on any inconsistencies or ambiguities in their description of the defendant's conduct, or any circumstances relating to the creation or reproduction of the documents, that affect their usefulness for determining whether Shepard and the government both believed that an entry into a building was at issue when he entered the guilty pleas. *Shepard II, 231 F.3d at 69.*

181 F. Supp. 2d 14, *; 2002 U.S. Dist. LEXIS 1280, **

**[**7]**

After two hearings, myriad briefs, and additional submissions of the parties, I have evaluated the police reports and complaint applications as well as the defendant's affidavit. I concluded that the police reports did not provide reliable evidence on the central question, what did the defendant plead to in the state court? There is no evidence that the defendant and the government "shared [the] belief" that Shepard was pleading guilty to the unlawful entry of a building. *Shepard II, 231 F.3d at 66.*

As I describe below in greater detail, there was no transcript of the state plea colloquy, no presentence report containing the police reports, and no written plea agreement. The only account of the plea process that I have comes from the defendant's affidavit. The government offered no other version -- no account from the state prosecutor or any other participant, no recitation of whether it was "standard practice" of the judge to review the report in open court. The defendant indicated that the police reports were never read or mentioned at his plea colloquies. They **[*18]** were never made a part of the plea process at all, either by way of exhibit or orally. Furthermore, **[**8]** Mr. Shepard points to instances in which the reports were vague or obviously based on hearsay.

Apart from the state plea colloquy, nothing the defendant said at the instant sentencing hearing or in his various court submissions qualifies as an admission that he had in fact pled to the crime of breaking and entering into a building in state court.

While I could not conclude by a fair preponderance of the evidence that Mr. Shepard had pled to the qualifying crimes of violence, I reiterated my conclusion that an upward departure was appropriate. Mr. Shepard's criminal history score, I found, understated the seriousness of his record under U.S.S.G. § 4A1.3, p.s. As a result, I reimposed the original sentence.

## I. FACTS

Mr. Shepard pled guilty to a number of state offenses; at least five have been cited by the government as predicate offenses to ACCA. In each case, the state complaints tracked the Massachusetts statute (*Mass. Gen. L. Ch. 266 § 16*, 18,) n6 a statute which includes breaking and entering into a building as well as breaking and entering into a ship, vessel or vehicle. Case law under the ACCA identifies only breaking and entering into a building or other structure **[**9]** with intent to commit a crime as a crime of violence under the ACCA. *Taylor v. United States, 495 U.S. 575, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990).* In contrast, breaking and entering into a ship, vessel or vehicle is not a crime of violence under the ACCA. Id.

n6 The relevant statutes provide:

Section 16:

Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, . . . shall be punished by imprisonment in the state prison for not more than twenty years, or in a house of correction for not more than two and one half years.

*Mass. Gen. L. Ch. 266 § 16* (2000).

Section 18:

Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or motor vehicle or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years.

*Mass. Gen. L. Ch. 266 § 18* (2000). The statute was amended in November 1989 to include the "or motor vehicle" language.

**[**10]**

The government introduced certified copies of police reports related to four offenses. In some instances, these reports were made part of applications for complaints. Significantly, the complaints themselves did not reflect the information contained in the reports on the issues relevant to this case; in each case, the complaints just tracked the boilerplate language of the statute. n7

n7 The reports were as follows:

(1) May 1989 Boston Police Report (paragraphs 58, 59 of the PSR):
Responded to R.C. [radio call] to 30 Harlem St. for B & E in progress. On arrival observed cellar door in rear had been broken down. Spoke to victim who [said] she heard noises downstairs. She then observed suspect described above in her pantry

Consistent with the police report, the complaint application states that the defendant was charged with "breaking and entering night" and that the property stolen or destroyed was a "cellar door." But the complaint itself says only that, on 5/6/89, the "defendant did break and enter in the night time, the building, ship, vessel or vehicle, the property of Jerry Cothran, with intent to commit a felony therein."

(2) March 1991 Watertown Police Report (paragraphs 68, 69 of the PSR):
In reference to . . . a B & E & L from the FRETTERS store . . . reported on 3-11-91 the following is submitted: A follow-up investigation revealed that while the manager . . . and the assistant Manager . . . were in the back-room to the above business [sic] . . . they observed the back door open and observed a former employee, Reginal [sic] Shepard . . . enter the room. Upon seeing the two managers, the suspect Shepard ran from the room in a northerly direction out the parking lot towards Arsenal street . . . According to both employee's [sic] this door was locked and the only way in was with a key which they suspect Shepard had in his possession.

After the incident, the managers did an inventory and found certain equipment missing.

The complaint states that on 3/11/91, the defendant did break and enter in the night time, the building, ship, vessel or vehicle, the property of Fretters, with intent to commit a felony therein.

3) July 1991 The Boston Police Report (paragraphs 70-71of the PSR):
Officers . . . responded to a radio call for an S/P wearing red shorts and blue shirt in the hallway of 258 Norwell Street. Upon arrival observed S/P (described above) walking away from above address . . . carrying a pink pillowcase . . . found pillowcase to contain property listed above . . . Officers checked bldg and found a panel on 3d floor front door had been broken in exposing inside door lock. When the officers entered the living room, they 'observed, in living room, areas where V.C.R. and phone were taken from' . . . also observed in bedroom one pink pillowcase missing from pillow.

The complaint application states the defendant is charged with "b/e daytime" and the place is "258 Norwell St." The complaint, however, states that on 7/18/91, "the defendant did break and enter in the day time the building, ship or vessel of Monica Collins with intent to commit a felony therein."

4) February 1994 Boston Police Report (paragraphs 70-77 of the PSR):
Responded to R/C [radio call] for a black male going door to door asking for an unk. person . . . [Witness said suspect] went next door to # 145 Gallivan and was observed by the witness attempting to gain entry by turning several door knobs . . . Officer . . . went to the rear of the property and suspect was observed with both arms through the glass partition (Glass to door was shattered) attempting to gain entry to the second door (near basement.)

The complaint application charges the defendant with "breaking and entering," and "wilful malicious destruction of personal property," at 145 Gallivan Blvd. The complaint stated, "on 2/3/94 the defendant did break and enter in the day time, the building, ship or motor vehicle or vessel of Russell McGaugh with intent to commit a felony therein."

5) April 1989 (Paragraphs 53-55 of the PSR: The complaint application suggested that the defendant broke into the Crispus Attucks Children's Center by breaking a window and did put the Director the Center in fear and did take baby food, and certain equipment.

The complaint however, states that on 4/2/89, "the defendant did break and enter in the daytime, the building, ship, or vessel of Crispus Attucks Children's Center with intent to commit a felony therein."

**[**11]**

**[*19]** Mr. Shepard filed an affidavit on remand. n8 His affidavit focused on each of the police reports, which he reviewed one by one. He indicated that none of the details in these reports were ever mentioned at his pleas. Moreover, he indicated that the reports themselves were never read by the judge to him during the plea colloquy; nor was he ever asked if the information contained in the Incident Reports were true. He noted further that parts of the reports were ambiguous and based on hearsay. n9 He added with respect **[*20]** to each report: "I did not admit the truth of the information contained in the Incident Report as part of my plea and I have never admitted in court the facts alleged in the report are true."

n8 At the initial sentencing, the defendant objected to the "recitation of alleged factual information drawn from sources such as police reports and complaint applications," citing Taylor. On remand he submitted an affidavit, described above.



n9 With respect to the Watertown report, Shepard notes that part of the report is based on the hearsay statements of two employees (that a certain door was locked and "the only way in was with a key they suspect Shepard has in his possession", and that they "believe" upon Shepard's termination he "never turned his stores keys into [sic] the manager.") The employees did not see Shepard take anything; it was only after an inventory that they realized certain things were missing.

**[**12]**

No transcript of the plea colloquy was offered for any of the pleas cited by the government. The government represented that none was available. Likewise, no one offered any presentence reports which might have contained a police report or written plea agreements. There was no evidence suggesting that the police reports had ever been made part of the plea colloquy, in writing or orally. n10

n10 A word about plea colloquies in the courts of Massachusetts: The defendant pleads guilty and is usually sentenced immediately. A presentence report is made available only if either party moves for it. See Mass. R. Crim. P. 12. There are rarely written plea agreements.

Apart from Mr. Shepard, no witness described what had occurred at the plea colloquy -- no police officers, prosecutors or attorneys. In short, no document was offered rebutting Mr. Shepard's account of what went on. n11

n11 In *Commonwealth v. Quinones, 414 Mass. 423, 608 N.E.2d 724 (1993)* for example, a defendant filed a motion to withdraw his plea on the grounds that it was not a knowing and voluntary waiver of his constitutional rights. No transcript of the earlier plea colloquy was available. The vehicle containing the stenographic notes of the court reporter had been stolen. The trial judge denied the motion based on his "practice" in taking and accepting pleas of guilty and his "memory" of the proceedings. *Id. at 424.* The Supreme Judicial Court of Massachusetts affirmed on the ground that "if the record is unavailable, it may be reconstructed through testimony or other suitable proof of what happened in court when the guilty plea was taken." *Id. at 432.*

**[**13]**

II. ANALYSIS

A. The Question to Be Answered on Remand Is: What Did Mr. Shepard Plead To?

The question on remand, and indeed, the central question under the ACCA is: What did Mr. Shepard plead to? As the First Circuit noted, the question is "not what Shepard did to provoke the criminal charges to which he pled guilty." *Shepard II, 231 F.3d at 68.* n12

n12 The First Circuit's question mirrors that of the Supreme Court in Taylor. The question in Taylor was, "whether, in the case of a defendant who has been convicted under a nongeneric - burglary statute [e.g. one that includes places, such as automobiles and vending machines, other than buildings], the government may seek enhancement on the ground that he actually committed a generic burglary." *Taylor, 495 U.S. at 599-600* (emphasis added). The Court answered: "No." The categorical approach of Taylor looks to what the defendant was convicted of, not what he did.

I will briefly review the ACCA **[**14]** case law and statutory language for two purposes -- to put the government's arguments in context and to demonstrate the ways in which the government's approach would require me to do precisely what Taylor and its progeny forbid.

The ACCA imposes a mandatory sentence of at least fifteen years, and up to life imprisonment for illegal possession of a firearm, by anyone who has three prior convictions for violent felonies or serious drug offenses. The linchpin is the word "conviction." While some judges believed that the "mere" fact of three prior felonies, without more, was not enough to make a career criminal, and hesitated or even refused to send the defendant to jail on that score alone, n13 the language of the Act and **[*21]** its legislative history was clear: Judges applying the ACCA should confine their identification inquiry to the conviction record - the number, type and timing of prior convictions. See James E. Hooper, Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act, *89 Mich. L. Rev. 1951, 1967 (1991)*("The ACCA contemplates an examination of the conviction record, and little else.") The Supreme Court reaffirmed this in *Taylor v. United States, 495 U.S. 575, 602, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990)*: **[**15]** "We think the only plausible interpretation of [the ACCA] is that . . . it generally requires the trial court to look only to the fact of conviction and that statutory definition of prior offense." n14 Calling the methodology the "categorical approach," *495 U.S. at 602*, the Court cautioned the judge against becoming embroiled in a "daunting" factual inquiry about what had actually happened at the

time of the state offense, n15 particularly where the state offenses occurred some time ago. *Taylor, 495 U.S. at 600.* The aim was only to look to the "charging documents," not "plunge into the details of a particular defendant's conduct." *Shepard II, 231 F.3d 56, 65* (citing *United States v. Winter, 22 F.3d 15, 19 (1st Cir. 1994)).*

n13 See, *United States v. Wicks, 833 F.2d 192, 195 (9th Cir. 1987),* cert. denied, *488 U.S. 831, 102 L. Ed. 2d 63, 109 S. Ct. 87 (1988)*(Pregerson, J., dissenting)("I would . . . hold that something more than three convictions is required . . . Here, where two of the three convictions stemmed from burglaries that occurred on the same night, I would hold that [the ACCA] was not intended to, and therefore does not, apply."); *United States v. Balascsak, 873 F.2d 673, 683-84 (3d Cir. 1989).* (Becker, J. concurring) (refusing to enhance the sentence unless the conviction history showed "the crimes (and the episodes of which they were a part) were truly separate").

**[**16]**

n14 This focus on convictions and the statutory offense definitions under the ACCA is notably different from the methodology for determining criminal history departures under the chapter 4 of the Sentencing Guidelines. Recognizing the inadequacies of the criminal history scoring system, the Sentencing Commission encouraged departures in broad terms -- where "reliable information" indicates that the criminal history category "significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes." U.S.S.G. § 4A1.3, p.s. "Reliable evidence" can include prior sentences that were not counted in the score, as well as "prior similar adult criminal conduct not resulting in a criminal conviction." Id. Police reports may well be an important source of "reliable information" for such departures. As I noted in *United States v. Footman, 66 F. Supp. 2d 83, 93 (D. Mass. 1999),* aff'd. *United States v. Footman, 215 F.3d 145 (1st Cir.2000),* however, the "reliable information" of "prior similar conduct" raises serious problems of its own.

n15 Indeed, the legislative history reflects a concern about broadening the inquiry beyond the conviction record. While some believed a record of conviction might predict recidivism, other factors which a court might take into account were less clear. Hooper, Bright Lines, Dark Deeds, *89 Mich. L. Rev. at 1963-64.*

**[**17]**

Where, as here, the state statute to which the defendant pled guilty did not track the federal definitions under the ACCA, the court was obliged to dig further. Nevertheless, the First Circuit has been clear about the limitations of "the dig": The judge may not hold a mini-trial on the particular facts underlying the prior offense, but he or she may "peek beneath the coverlet" of the formal language to ascertain whether the conviction was for a non-violent or a violent crime. *Dueno, 171 F.3d 3, 5 (1st Cir. 1999).*

B. The Government Bears the Burden of Proving What Mr. Shepard Pled To

Plainly, the government bears the burden of "proving the applicability of an upward adjustment under the guidelines **[*22]** [or the ACCA]," *Shepard II, 231 F.3d at 69* (citing *United States v. Dueno, 171 F.3d 3, 7 (1st Cir. 1999)),* and thus, reconstructing the record. If the record is ambiguous, if it does not allow me to say one way or the other what Mr. Shepard agreed to plead to, then the enhancement should not apply.

The court's "peek beneath the coverlet" could involve one of three scenarios. If the defendant was convicted after a trial, the **[**18]** court is permitted to consider the jury instructions to understand what the plea consisted of. *United States v. Damon, 127 F.3d 139, 142 (1st Cir. 1997).* If a guilty plea, the court may review the plea colloquy. Id. Or the court may review the defendant's statements or pleadings to see if they comprise admissions that the prior pleas were pleas to the predicate ACCA offenses. *United States v. Harris, 964 F.2d 1234, 1236-37 (1st Cir. 1992).*

In this case, in order to decide what Mr. Shepard has pled to I must look in two directions: a) reconstructing the plea colloquy, and b) determining whether the defendant's responses (or failures to respond) to the PSR and the police reports attached thereto amount to an admission of the facts recited in the documents.

C. Reconstructing the Plea Colloquy

1. Relationship of Police Reports to the Plea Colloquy

The government offered certified copies of the police reports; at least five of these pleas, it suggested, were pleas to a crime of violence, breaking into a building.

The First Circuit has called for careful consideration of those reports. To the question, "may a sentencing court consider **[**19]** certified copies of police reports and complaint applications to determine whether a defendant pled guilty to three prior 'violent felonies' qualifying for sentence enhancement under the [ACCA]," *Shepard II, 231 F.3d at 58,* the answer was plainly, "yes."

But the reverse position, which the government seems to urge, is not appropriate -- that certified police reports are all that is needed, without proof that they were part of the plea colloquy, that they were exhibits to the colloquy, part of a plea agreement, or referred to by the judge or the prosecutor as part of the factual basis for the plea.

To be sure, the police reports offered by the government were certified. But certification established only that the document was an accurate copy of the police report. It does not answer the question: What did the defendant plead to? *Shepard II, 231 F.3d at 60 n.2.* Neither does the parties' concession that the police report accompanied the application for a complaint, which made it part of the charging documents. In order to have persuasive evidence of what Mr. Shepard plead to, the police reports must have had some tangible relationship to the plea **[**20]** colloquy. This conclusion is clear from the questions that the Court posed as examples of the kind of inquiries I should make on remand:

A) Did the court taking the guilty plea have before it the police reports and complaint applications described in the PSR, or any other documents describing the defendant's conduct?

B) What took place at Shepard's plea hearings?

C) Did the defendant provide anything at his plea hearings to contest the facts set forth in the police reports and complaint applications, thereby suggesting that the government and the defendant did not share an understanding that he was pleading guilty to an offense that had the elements of a generically violent crime?

**[*23]** D) Where did the police reports come from? n16 Shepard II, 231 F.3dd at 68.

n16 To be sure, this question, taken out of context as described below, might suggest that all the government has to do is prove that the report was an accurate copy of the original -- i.e., certify the report. As I suggest throughout, that interpretation of Shepard II would be inconsistent with the categorical approach. The police reports have relevance only insofar as they were part of the plea process or a federal presentence report to which the defendant did not adequately object.

**[**21]**

2. The Record: No Transcripts, State Presentence Reports, or Plea Agreements -- Only Shepard's Affidavit

A review of the plea colloquy would obviously enable me to reconstruct the plea and answer the relevant questions. If the police report had been offered as part of the plea, had been an exhibit to the plea colloquy, or had been orally recited as part of the factual basis of the plea, then I could conclude that Mr. Shepard adopted those facts.

The problem is that there is no record of the plea colloquy. There is no formal plea agreement (to which a police report might have been attached). There was no state presentence investigation which may have clarified the factual basis for this plea. There is no rebuttal offered by the government to Shepard's account of what went on during the plea colloquy.

The only account is Mr. Shepard's, and he insists that the police reports were never mentioned during his pleas. Mr. Shepard's affidavit states unequivocally that the police reports offered here were never made part of the plea colloquy, never explained to him, and never acknowledged by him to be accurate at that time or at any other.

3. The Government's Position Is **[**22]** Inconsistent with United States v. Harris, n17 United States v. Custis, n18 and United States v. Daniels. n19

n17 *964 F.2d 1234 (1st Cir. 1992).*

n18 *511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994).*

n19 *532 U.S. 374, 121 S. Ct. 1578, 149 L. Ed. 2d 590 (2001).*

Nevertheless, the government wants the Court to infer that Mr. Shepard pled guilty to the facts contained in the various reports. It suggests that if the police report recited certain facts, namely, what happened and where it happened, and the defendant did not specifically deny those facts, he "must have" pled guilty to them. Or, it implies, since the police report included those facts, it is reasonable for me to assume that everyone - defendant and government - "must have" shared the intent to plead guilty to them. How could Mr. Shepard have pled guilty to breaking and entering at all if he were not pleading to those facts, they suggest? What facts could he have reasonably contested?

These inferences are not only unwarranted in the record; they are troubling. **[**23]** Since I do not know the specifics of what Mr. Shepard actually did (in terms

of the crime), or what the state of the evidence against him was, or what other information the officers had, or what he was in a position to contest, in order to adopt the government's position, I would have to speculate about critical issues.

To take the facts as admitted in the police report because the defendant never specifically denied them during the plea would turn the plea process on its head. Mr. Shepard was never asked to deny or accept the facts that are of relevance to **[*24]** this federal proceeding. All that I can tell from the record is that he pled to the boilerplate complaint, phrased in terms of the general breaking and entering statute. As a matter of evidence law, this could hardly qualify as an admission. n20

> n20 The only "admissions" category relevant here would be an "admission by silence." These admissions are admissible on the theory that a person would protest the statement made in his presence if untrue. M. Graham, 3 Handbook of Federal Evidence § 801.21 (5th ed. 2001) (describing application of *Fed. R. Evid. 801(d)(2)*). Plainly, nothing that I know about Mr. Shepard's plea colloquy would justify such an inference.

**[**24]**

Indeed, the government's position is tantamount to placing the burden of proof on the defendant, and an extraordinary burden at that. He could dispel the inferences not by saying, "I did not plead to those details," as he has done, but only by saying, "I did not do this or that act as the police report says." n21

> n21 Even if I were to engage in the inquiry - the "must haves" that the government's analysis invites - I would conclude that these reports are sketchy, at best. With the sole exception of two of them (Watertown 1994, Boston 1991), they reproduce the hearsay accounts of witnesses on the scene.

Taylor expressly eschews such an approach - evaluating the actual course of conduct which triggered the criminal offense, making factual findings not necessarily ever made by the state court in federal court, and if the particular issues were not litigated in state court, litigating them in federal court. Indeed, the Court adopted the categorical approach even when it recognized the problem presented by the **[**25]** instant case -- when a defendant pleads guilty but no record of the plea survived colloquy. *Taylor, 495 U.S. at 601-2.*

Plea bargains affect guilty pleas that may or may not be on all fours with the charging documents; they are the product of strategic "bargains" after all, based on the sentence offered, the risks of trial, and the state of the evidence. As the Supreme Court noted, "In any case where the defendant pleaded guilty, there is often no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, non-burglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." *Taylor, 495 U.S. at 601-02,* cited approvingly in *Shepard II, 231 F.3d at 69-70.*

Other courts have confronted similar situations as the instant one and have rejected arguments similar to those made by the government. In *United States v. Shannon, 110 F.3d 382 (7th Cir. 1997),* the defendant pled to statutory rape, which could include either consensual intercourse or forcible rape of a minor. While the **[**26]** complaint contained details consistent with the latter, the information to which the defendant pled alleged only statutory rape. The Ninth Circuit looked to the information, holding that "the information was the basis of the conviction and sentence and all its allegations were admitted and must be deemed established, while the complaint contains factual allegations that are contested and would require an evidentiary hearing to confirm." *Id. at 384.* Likewise, in the instant case, I am obliged to review only the indictment, and not the application for the complaint or police reports not made part of the record.

Or, in the case of a jury trial, if the jury instructions were lost, plainly the court is not authorized to review the transcript to determine what the trial "must have been" about or what the jury "must have" convicted **[*25]** the defendant of. The Supreme Court disapproved of such an approach in *Taylor, 495 U.S. at 601.*

To be sure, a "Taylor-type" review of documents may include more than the charging document. See e.g. *United States v. Maness, 23 F.3d 1006, 1009-10* (6th Cir.), cert. denied, *513 U.S. 906, 130 L. Ed. 2d 189, 115 S. Ct. 271 (1994)* **[**27]** (reviewing transcript of guilty pleas and indictments to determine whether defendant actually committed generic burglary when he pled guilty to charges that contained all of the elements of a generic burglary); *United States v. Rutherford, 54 F.3d 370, 372 n. 4* (7th Cir.) cert. denied, *516 U.S. 924, 133 L. Ed. 2d 224, 116 S. Ct. 323 (1995)*("If necessary to resolve an ambiguity in the charging document, the courts may also, in some circumstances, examine the presentence report, plea agreement, or factual findings of the sentencing court"); *United States v. Smith, 10 F.3d 724, 733-34 (10th Cir. 1993)*(per curiam)(holding that "a court can look beyond the statutory count of conviction in order to resolve a patent ambiguity caused by a broad



state statute"; however, the examination is limited to "the charging papers, judgment of conviction, plea agreement or other statement by the defendant for the record, presentence report adopted by the court, and findings by the sentencing judge.")

But the government has cited no case that suggested that a police report not made part of a plea colloquy, not reflected in the complaint or indictment, **[**28]** and not adopted by the defendant in the presentence report or at any other time can comprise "Taylor-type" evidence for the purpose of determining whether the underlying conviction was for a crime of violence. n22

> n22 I have found reference to the use of a police report as an independent piece of evidence, not as part of a formal proceeding or an admission in one case, *United States v. Richardson, 230 F.3d 1297 (11th Cir. 2000).* In Richardson, the court found that a police report was reliable evidence to determine timing of offenses - to operationalize the statutory requirement that the three previous convictions be "committed on occasions different from one another" rather than be part of the same criminal episode. The issue in Richardson -- the timing of offenses -- is not easily determined by Taylor's categorical approach.

A final note: The First Circuit and the Supreme Court have been clear about limiting collateral attacks on convictions during federal sentencing proceedings. **[**29]** *Custis v. United States, 511 U.S. 485, 128 L. Ed. 2d 517, 114 S. Ct. 1732 (1994)*(holding that with the sole exception of convictions obtained in violation of right to counsel, defendant in federal sentencing proceeding has no right to collaterally attack validity of previous state convictions used to enhance his sentence under the ACCA); *Daniels v. United States, 532 U.S. 374, 149 L. Ed. 2d 590, 121 S. Ct. 1578 (2001)* (with the sole exception of convictions obtained in violation of right to counsel, motion to vacate, set aside, or correct sentence is not the appropriate vehicle for determining whether a conviction later used to enhance a federal sentence under ACCA was unconstitutionally obtained). If, on the one hand as in Taylor, a defendant is not allowed to look below the surface of the plea to demonstrate that he did not really threaten anyone, even though the crime to which he pled was an ACCA predicate, then surely the government cannot do the reverse. It cannot look below the surface of the plea to show that even though the plea was to the general offense of breaking and entering and even though nothing else apparently was discussed, what was really going on was a plea **[**30]** to a violent crime.

In conclusion, in answer to the specific remand questions: According to the defendant's affidavit and uncontradicted by any **[*26]** other evidence, the court taking the guilty plea did not have before it the police reports and complaint applications described in the PSR or any other documents describing the defendant's affidavit. At Mr. Shepard's plea hearing, no one mentioned the police reports or the details comprised therein. The defendant did not contest the facts in the police reports and complaint application because the issues never came up. The police reports apparently come from the application for the complaint. There is no indication that they were ever made part of the record of the plea colloquy.

The government has failed to meet its burden of proof with the submission of the police reports.

D. Did Shepard Admit That He Had Pled Guilty to a Crime of Violence Whether in the State Plea Colloquy or in this Proceeding?

Case law suggests that, in addition to trying to reconstruct the circumstances of the plea or the conviction, the government could establish what the defendant pled to through his or her admissions. *Dueno, 171 F.3d at 6* **[**31]** (sentence defendant only for those specific "prior crimes of which he was convicted by a trier of fact or by his own admission.") But if the central question is -- what did the defendant plead to? -- then it follows that the relevant admission need be similarly focused -- an admission with respect to the subject of his guilty pleas, and not admissions about whether the defendant committed the underlying crime. The inquiry is still plea-focused. It is not about whether the defendant did the underlying crime. *Shepard II, 231 F.3d at 66* ("the court's determination about the meaning of the guilty plea can be made on the basis of sufficiently reliable evidence independent of a fact-specific admission. . . . Harris and Dueno leave open the question of what documents are sufficiently reliable evidence for determining whether a defendant's plea of guilty constitutes an admission to a generically violent crime") (emphasis added).

1. Objecting to the Presentence Report

The presentence report lists the defendant's convictions. Beneath each line describing the conviction, the probation officer typically includes a description of the offense from the **[**32]** police report. If the defendant did not object to that portion of the presentence report, presumably he or she would be admitting that the convictions as described in the PSR are accurate - not just the fact of the convictions, but their nature as well.

That is what occurred in *United States v. Harris, 964 F.2d 1234 (1st Cir. 1992)*. The Court characterized the holding in Harris as concluding that the PSR was "a reliable source for establishing whether the defendant pled guilty to a violent crime because the basic facts alleged in the PSR -- i.e., that the defendant perpetrated a violent assault - were 'uncontested and uncontradicted.'" *Shepard II, 231 F.3d at 65* (emphasis added). Since the PSR was uncontradicted, it was reasonable to conclude that both defendant and the government believed that the plea amounted to a plea to the generically violent crime.

In Dueno, the court found that the trial court erroneously concluded that the predicate offense was the violent version, breaking and entering a building, rather than the non-violent version, breaking an entering a car or boat, when the complaint to which the defendant pled could comprise **[**33]** either. Rather than remanding the case for additional fact findings, the government urged the court just to look to the PSR, as it had done in Harris, since the defendant never objected to it. The PSR **[*27]** characterized the offense in question as the violent version, breaking and entering a building.

The court refused, unwilling to engraft a finding of that seriousness to Dueno's failure to object to the PSR, because Dueno's failure to object to the PSR's account, the court found, was not enough to "ground a finding that [he] pleaded guilty to breaking into and entering a building." *Shepard II, 231 F.3d 66* (quoting from *Dueno, 171 F.3d at 7)*. A remand was ordered, in which the court pointed out several issues that the trial court needed to resolve.

The court's language is telling. Two of the problems the court noted related to the record before the judge who accepted Dueno's state plea. The evidence "did not include 'a single document that was before the judge who accepted Dueno's plea, [and] there was no account of what took place at Dueno's plea hearing." *Shepard II, 231 F.3d at 66.*

But the court also mentioned, and this is **[**34]** the point the government emphasizes, that a third problem with the Dueno record was that the PSR included facts that were taken from the police report, but the record did not include the report itself.

From that general suggestion on the Dueno remand, the government makes two arguments: First, all that the government needed to do in order to meet the requirements of the ACCA, and the First Circuit case law, was to produce the certified police report to supplement the PSR. Second, once the government does so, the burden then shifts to the defendant to show the ACCA enhancement does not apply.

The government has taken the police report discussion in Dueno, later repeated in Shepard II, out of context. A certified copy of the police report may show that the PSR accurately describes what the police said in the police report and application for a complaint, and may be taken as an admission to the predicate offense -- if there is no objection from the defendant. But if the defendant objects, as here, the police report alone cannot be used to establish what the defendant pled to or comprise an admission to the predicate offense.

To be sure, the court in Shepard **[**35]** II faulted Mr. Shepard's initial objections. Plainly, "any objection posed by a defendant at the time of sentencing to the facts set forth in a PSR" is not enough to keep a court from finding that the guilty plea constituted an admission to those facts. *Shepard II, 231 F.3d at 68.* All that Mr. Shepard said in his initial objections was that any description of the convicted offenses, beyond the language of the charging documents, is inappropriate under the ACCA.

But Mr. Shepard elaborated on his objections during the re-sentencing proceedings. His affidavits focused on each of the police reports. He indicated that none of the details in these reports were ever mentioned at his pleas. Moreover, he indicated that the reports themselves were never brought up. He noted further that parts were ambiguous and based on hearsay.

The government suggests that Mr. Shepard's additional affidavits are irrelevant at best, inadequate at worst. The only way the government can come to this conclusion is if it asked a different question - the very question which the United States Supreme Court and the First Circuit expressly do not ask. The only adequate response, according to the **[**36]** government, would be for the defendant to say -- "I did not do the things described in the police report" -- or else the facts of the report will be deemed admitted. Under this approach, it would not be enough for the defendant to say, as Mr. Shepard said **[*28]** here -- "I did not plead to those facts because they were not brought up at my plea colloquy."

If what he actually did is the test, as the former response suggests, then this area of the law has come full circle. The defendant says: "I didn't do what the presentence report of convictions said I did" or "I did not do what the police report said I did." The government rebuts, and then I have a trial in my courtroom of state court offenses dating from years ago, the very "archeological dig" that the case law rejects.

Plainly, there are problems with the categorical approach; the enhancement does hinge on the "happenstance of state court record-keeping practices." *Shepard II, 231 F.3d at 67.* But that is unavoidable even if police reports, complaint applications, and other documents are considered. Defendants will always get a windfall when the police lose the police report or other underlying documentation. Any standard **[**37]** which, as in Harris and Taylor, seeks to reconstruct the record necessarily depends on the comprehensiveness of that record.

The Ninth Circuit had to address this in *United States v. Parker, 5 F.3d 1322 (9th Cir. 1993)*. Parker was found guilty of felon in possession of a firearm. The government sought to enhance under the ACCA, based in part on a 1968 conviction. The 1968 charging instrument noted that Parker and a co-defendant "entered a residence . . . with intent to commit theft therein," a violent felony under *18 U.S.C. § 924*(e)(1). Parker, however, was convicted of the charge before a jury, but no jury instructions were available. The question was whether the court could look at the charging paper alone to determine the nature of the conviction when jury instructions were unavailable.

In a prior case, where the jury instructions were not available, the court held that the verdict form could be analyzed in connection with the charging paper. *United States v. Alvarez, 972 F.2d 1000, 1005-1006 (9th Cir. 1992)* (where the charging instrument included allegations of the elements of generic 'burglary' and the verdict **[**38]** stated that the jury found the defendant guilty "as charged in the information," there was enough evidence to establish that the conviction constituted burglary under section 924(e)).

But in Parker, the verdict form provided no information regarding the facts found by the jury. It merely referred to the statutory provision which had been phrased in generic terms. Thus, the court found that reliance on the "charging paper alone" to make the determination under the ACCA was not appropriate. *Parker, 5 F.3d at 1327*

And it added:

181 F. Supp. 2d 14, *; 2002 U.S. Dist. LEXIS 1280, **

Ultimately, whatever rule were adopted, someone -- either criminal defendants or the government -- would benefit from the loss or destruction of jury instructions. . . . Because we can assume that the problem of lost or destroyed instructions will affect primarily older convictions rather than recent ones, the rule we adopt is consistent with the general sentencing principle that he passage of time should dilute -- and not magnify -- the effect of past conduct on punishment for present acts.

*Id. at 1328.*

Surely the most reliable indicator of what the plea was about was the transcript and exhibits. But as **[**39]** the court noted, there are other ways of establishing the predicate offenses. A defendant may admit to the ACCA predicate or may be taken to have admitted to it through his failure to object to the PSR, as supplemented by a certified police record. The parties could reconstruct the plea through **[*29]** other means - the prosecutor's affidavit about what his usual practice was, the police officer who was present, etc.

But when a defendant denies that those police reports were part of the plea process and objects to probation's characterization of the offenses in the PSR, the government has to prove that there were predicate ACCA convictions. It has not done so here.

III. CONCLUSION

On this record, given this case law, I cannot conclude by a fair preponderance of the evidence that Reginald Shepard has been convicted of "at least" three crimes of violence under the ACCA.

Therefore, the original sentence I imposed on July 14, 1999 (46 months on Count I), was re-imposed on January 11, 2002, for the reasons stated above.

SO ORDERED.

Dated: January 23, 2002

NANCY GERTNER, U.S.D.J.

UNITED STATES, Appellant, v. REGINALD SHEPARD, Defendant,Appellee.
No. 99-2167

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

231 F.3d 56; 2000 U.S. App. LEXIS 28967

November 13, 2000, Decided

SUBSEQUENT HISTORY: [**1] Certiorari Denied October 1, 2001, Reported at: *2001 U.S. LEXIS 5704*.

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Nancy Gertner, U.S. District Judge.

DISPOSITION: Vacated and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff Government appealed from a judgment of the United States District Court for the District of Massachusetts, arguing that the district court erred by refusing to consider the police reports and complaint applications and by not sentencing defendant as an armed career criminal.

OVERVIEW: Defendant pled guilty to breaking and entering on the basis of a complaint that recited the boilerplate language of the statute. The Government submitted police reports and complaint applications to the district court to show that defendant had pled guilty to breaking and entering buildings on five prior occasions. The district court concluded that the United States Supreme Court prohibited consideration of the complaint applications and police reports. At the conclusion of a two-part sentencing hearing, the district court rejected the Government's request for an enhancement under the Armed Career Criminal Act, *18 U.S.C.S. § 924*(e). Government appealed, arguing that the district court erred by refusing to consider the police reports and complaint applications and by not sentencing defendant as an armed career criminal. On appeal, the court vacated the sentence and remanded for resentencing. The court reasoned that the district court did not carry out the required analysis of whether the documents before it constituted sufficiently reliable evidence of the Government and the defendant's shared belief that the defendant was pleading guilty to the unlawful entry of a building.

OUTCOME: Sentence vacated and remanded for resentencing; the district court did not carry out the required analysis of whether the documents before it constituted sufficiently reliable evidence of the Government and the defendant's shared belief that the defendant was pleading guilty to the unlawful entry of a building.

CORE TERMS: sentencing, violent felony, pled guilty, enhancement, burglary, crime of violence, guilty plea, breaking and entering, violent crime, categorical, police report, generic, non-violent, generically, violent, guideline, career, offender, reliable evidence, vessel, uncontradicted, imprisonment, convicted, firearm, physical injury, predicate, breaking, sentence, qualify, felony

LexisNexis (TM) HEADNOTES - Core Concepts:

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass
[HN1] See *Mass. Gen. Laws ch. 266, § 16*.

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass
[HN2] See *Mass. Gen. Laws ch. 266, § 18*.

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN3] The United States Supreme Court adopted a "generic" definition of burglary for purposes of the Armed Career Criminal Act, *18 U.S.C.S. § 924*(e), enhancement that limits the crime to an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN4] United States Sentencing Guidelines Manual § 2K2.1(a)(6)(A) prescribes a base offense level of 14 for a person who receives, possesses, or transports a firearm and has a prior conviction for a crime punishable by



imprisonment for more than one year. U.S. Sentencing Guidelines Manual § 2K2.1 cmt.

Criminal Law & Procedure: Appeals: Standards of Review: De Novo Review
[HN5] The question of whether a conviction for a particular type of crime qualifies as a predicate offense under the Armed Career Criminals Act presents a purely legal question, sparking de novo review.

Criminal Law & Procedure: Sentencing: Imposition: Factors
[HN6] The Armed Career Criminals Act provides that a person who violates the felon in possession of a firearm provision and has three prior convictions for a violent felony or serious drug offense, or both, committed on occasions different from one another will receive a 15 year minimum sentence. *18 U.S.C.S. § 924*(e)(1).

Criminal Law & Procedure: Criminal Offenses: Miscellaneous Offenses
[HN7] See *18 U.S.C.S. § 924*(e)(2)(B).

Criminal Law & Procedure: Criminal Offenses: Racketeering: Racketeer Influenced & Corrupt Organizations
[HN8] Predicate offenses under the Armed Career Criminal Act, *18 U.S.C.S. § 924*(e), are crimes having certain common characteristics--the use or threatened use of force, or the risk that force would be used--regardless of how they were labeled by state law.

Criminal Law & Procedure: Criminal Offenses: Miscellaneous Offenses
[HN9] The Armed Career Criminal Act defines as a "violent felony" a crime that otherwise involves conduct that presents a serious potential risk of physical injury to another. *18 U.S.C.S. § 924*(e)(2)(B).

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN10] The career offender enhancement applies if the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. U.S. Sentencing Guidelines Manual § 4B1.1.

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN11] The government bears the burden of proving the applicability of an upward adjustment under the United States Sentencing Guidelines Manual.

Criminal Law & Procedure: Sentencing: Imposition: Factors
[HN12] Sentencing enhancements do not punish a defendant for the prior criminal conduct. Rather, enhancements provide for a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.

COUNSEL: Nadine Pellegrini, Assistant U.S. Attorney, with whom Donald K. Stern, United States Attorney, Dina Michael Chaitowitz, Timothy Q. Feeley, Assistant U.S. Attorneys, were on brief for appellant.

Linda J. Thompson, with whom Jacobson & Thompson, P.C., were on brief for appellee.

JUDGES: Before Torruella, Chief Judge, Lipez, Circuit Judge and Keeton, * District Judge.

* Of the District of Massachusetts, sitting by designation.

OPINIONBY: LIPEZ

OPINION: [*58]

LIPEZ, Circuit Judge. This case requires us to decide the following question: may a sentencing court consider certified copies of police reports and complaint applications to determine whether a defendant pled guilty to three prior "violent felonies" qualifying for sentence enhancement under the Armed Career Criminal Act (ACCA), *18 U.S.C. § 924*(e). This question arises because the Massachusetts breaking and entering statute encompasses unlawful entries into buildings, vehicles, or vessels. For purposes [*59] of the ACCA, however, breaking and entering[**2] into a building qualifies as a violent felony, while breaking and entering into a vehicle or vessel does not.

On at least five prior occasions, Reginald Shepard had pled guilty to breaking and entering on the basis of a complaint that recited the boilerplate language of the statute. The government submitted police reports and complaint applications to the district court to show that Reginald Shepard had pled guilty to breaking and entering buildings on these five prior occasions. At sentencing, the district court concluded that the Supreme Court decision in *Taylor v. United States, 495 U.S. 575, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990)*, and our own precedents applying Taylor, prohibited consideration of the complaint applications and police reports. In the view of the district court, such consideration would be

inconsistent with the categorical approach to the analysis of predicate offenses announced in Taylor because police reports and complaint applications "contain allegations that were never adjudicated before a judge or jury, never admitted by Shepard." We disagree with the court's reading of Taylor and our precedents. We vacate the district court's[**3] ruling and remand for resentencing.

I.

On October 17, 1995, Reginald Shepard sold firearms to an undercover agent of the Bureau of Alcohol, Tobacco, and Firearms. During the taped meeting, Shepard sold a Glock 17, 9mm pistol for $600 and ammunition for $20.00. On March 3, 1999, Shepard entered a guilty plea to one count of felon in possession of a firearm, *18 U.S.C. § 922*(g)(1). The ACCA mandates a fifteen-year minimum penalty for a person convicted as a felon in possession of a firearm pursuant to *18 U.S.C. § 922*(g) who has three prior convictions for a violent felony or serious drug offense. See *18 U.S.C. § 924*(e)(1). The government claimed that five of Shepard's eleven prior convictions were burglaries of buildings, a category of violent felony under the ACCA.

The complaints charging Shepard with breaking and entering recited the language of Chapter 266, sections 16 and 18, of the Massachusetts General Laws which define the offense to include unauthorized entry into vehicles or vessels, as well as buildings. n1 For example, a complaint from May 1989 states that Shepard "did break and enter in the[**4] night time the building, ship, vessel or vehicle, the property of Jerri Cothran, with intent to commit a felony therein."

----------Footnotes----------

n1 Section 16 provides:

Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, . . . shall be punished by imprisonment in the state prison for not more than twenty years or in a jail or house of correction for not more than two and one-half years.
[HN1]
*MASS. GEN. LAWS ch. 266, § 16.*

Section 18 provides:

Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or motor vehicle or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years.
[HN2]
*MASS. GEN. LAWS ch. 266, § 18.*

----------End Footnotes----------

In *Taylor v. United States, 495 U.S. 575, 598, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990),*[**5] [HN3] the Supreme Court adopted a "generic" definition of burglary for purposes of ACCA enhancement that limits the crime to "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." To show that Shepard's breaking and entering convictions involved buildings rather than vehicles or vessels, the Government offered certified copies of complaint applications and police reports obtained from the state court files. n2 These [*60] documents contain the following accounts of the five offenses at issue.

May 1989: The Boston police report states:

Responded to R.C. [radio call] to 30 Harlem St. for B & E in progress. On arrival observed cellar door in rear had been broken down. Spoke to victim who [said] she heard noises downstairs. She then observed suspect described above in her pantry.

Consistent with the police report, the complaint application states that the defendant was charged with "breaking and entering night;" that the place of offense was "30 Harlem St.," and that the property stolen or destroyed was a "cellar door."

March 1991: The Watertown police report states:

In reference to . . [**6] a B&E&L from the FRETTERS store # 550 Arsenal Street Town reported on 3-11-91 the following is submitted:

A follow-up investigation revealed that while the manager . . . and the assistant Manager . . . were in the back-room to the above buisness [sic] . . . they observed the back door open and observed a former employee, Reginal Shepard of # 9 Weaver Way Roxbury, enter the room. Upon seeing the two managers, the suspect Shepard ran from the room in a northerly direction out the parking lot toward arsenal street.

NOTE* According to both employee's [sic] this door was locked and the only way in was with a key which they suspect Shepard had in his possession. . . .

After this incident took place both [managers] did a quick inventory of the backroom area and found that (4) Emerson VCRs (20) 13" Hitachi T.V.s and (1) 19" Toshiba T.V. were missing. n3

July 1991: The Boston police report states:

Officers ... responded to a radio call for an S/P wearing red shorts and blue shirt in the hallway of 258 Norwell St.

Upon arrival observed S/P (described above) walking away from above address. S/P carrying a pink pillowcase. Officers detained S/P to conduct threshold [**7]inq., found pillowcase to contain property listed above. . . . Officers checked bldg and found a panel on 3rd floor front door had been broken in exposing inside door lock. Officers entered apt. and observed, in living room, areas where V.C.R. and phone were taken from. Officers also observed in bedroom one pink pillowcase missing from pillow. Sheets and pillowcases in bedroom were all pink in color.

Consistent with the police report, the complaint application states that the defendant is charged with "b/e daytime," that the place of offense is "258 Norwell St." and that the property stolen or destroyed was a "V.C.R" and "phone/ans. machine."

February 1994: The Watertown police report states:

Responded to a R/C [radio call] for a black male going door to door asking for an unk. person. . . . [Witness said suspect] went next door to # 145 Gallivan and was observed by the witness attempting to gain entry by turning several door knobs . . . Officer ... went to the rear of the property and suspect was observed with both arms through the glass partition (Glass to door was shattered) attempting to gain entry to the second door (near basement).

The complaint[**8] application states that the defendant was charged with "1. breaking & entering 2. wilful malicious destruction of personal property," that the place of offense was "145 Gallivan Blvd.," and that [*61] the property stolen or destroyed was a "rear door."

April 1989: According to the district court: n4

The complaint application suggested that a building was involved, alleging that Shepard gained access to the Children's Center by breaking a window, and in so doing, he put the Director of the Center in fear.

----------Footnotes----------

n2 By certifying a document, the signer attests that it has been accurately copied, not that the facts in it have been verified. The certifications of the police reports and complaint applications signed by the clerk or magistrate in this case state: "I hereby certify that this is a true copy, given under my hand and seal this 6 day of May 1999."

n3 The record does not include a complaint application.

n4 We refrain from the district court's rendering of the complaint application because we do not have the application in the record before us. The district court notes that the government did "not provide any additional documentation."

----------End Footnotes----------

[**9]

The Probation Department included in the Pre-Sentence Report (PSR) descriptions of the police reports and complaint applications. The department concluded, however, that the court could not sentence Shepard as an armed career criminal because it could not use those documents to determine whether Shepard had pled guilty to a violent felony. Shepard agreed with the department's conclusion, but he objected to the inclusion in the PSR of factual allegations other than those set forth in the complaints to which he had pled guilty in state court. The government also filed an objection with the court challenging the Probation Department's failure to apply the ACCA enhancement.

At the conclusion of a two-part sentencing hearing, the court rejected the government's request for an enhancement under the ACCA, which would have placed Shepard's sentencing range at 188-235 months. Instead, the court sentenced Shepard pursuant to the "prohibited person" provision, [HN4] U.S.S.G. § 2K2.1(a)(6)(A), which prescribes a base offense level of 14 for a person who receives, possesses, or transports a firearm and has a prior conviction for a "crime punishable by imprisonment for more than one year," U.S.S.G. [**10] § 2K2.1, comment. (n.6). The court also granted the government's motion for an upward departure pursuant to U.S.S.G. § 4A1.3 due to the seriousness of Shepard's criminal history and increased his sentencing range from 30-37 months to 37-46 months. We quote at length the district court's lucid rationale for its decision:

Police reports and complaint applications do not meet the narrow exception to the categorical approach. They contain allegations that were never adjudicated before a judge or jury, never admitted by Shepard. In fact, there is no indication that the sentencing judge in the original case even had any of these documents available when he or she sentenced Shepard. See [ *United States v.] Dueno, 171 F.3d [3] at 6* (noting the government provided no documents which had been before the judge when the plea was accepted).

No plea colloquies or plea agreements were offered to suggest that Shepard adopted one version of the facts rather than another for each of the convictions. Moreover, because Shepard objected to the factual representations in the PSR, the government cannot rely on the characterizations found within. See [ *United States v.] Harris, 964 F.2d [1234] at 1236-37*.

In[**11] fact, not only did Shepard not litigate these facts, he had no idea he had to do so. These facts -- the location of the breaking and entering -- were not necessary to his state plea. It is only now, years later, that they seem central because of a federal sentencing regime enacted years after Shepard pled.

Contrast Shepard's situation with that of a federal defendant pleading guilty today. Now, federal defendants who plead guilty make strategic decisions about which facts to contest and which to accept, carefully considering the impact their admissions will have on the ultimate sentence. The plea colloquy has assumed new significance, which it never had in state court.

To attach such importance to facts neither litigated nor conceded violates the policies articulated by the Supreme Court in Taylor, and subsequent First Circuit precedent. See *Taylor, 495 U.S. [*62] at 600-602* (unfair to impose a sentencing enhancement based on the federal court, rather than the state court's review of the facts); *Dueno, 171 F.3d at 6* (sentence defendant only for those specific "prior crimes of which he was convicted by a trier of fact or by his own admission"). [**12]

The government brought this appeal, arguing that the district court erred by refusing to consider the police reports and complaint applications and by not sentencing Shepard as an armed career criminal. [HN5] The question of "whether a conviction for a particular type of crime qualifies as a predicate offense [under the Armed Career Criminals Act] presents a purely legal question, sparking de novo review." *United States v. Winter, 22 F.3d 15, 18 (1st Cir. 1994)*.

II.

A. The Taylor Categorical Approach

[HN6] The Armed Career Criminals Act provides that a person who violates the felon in possession of a firearm provision ( § 922(g)) and has three prior convictions "for a violent felony or serious drug offense, or both, committed on occasions different from one another" will receive a fifteen-year minimum sentence. n5 *18 U.S.C. § 924*(e)(1). The statute defines a violent felony as:

Any crime punishable by imprisonment for a term exceeding one year . . . that

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use[**13] of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

[HN7] *18 U.S.C. § 924*(e)(2)(B).

----------Footnotes----------

n5 When the ACCA applies, the Guidelines address whether, based on the defendant's criminal history and offense level, the fifteen-year minimum or a greater sentence is warranted. U.S.S.G. § 4B1.4 specifies how the court should calculate the defendant's criminal history and base offense level so that it can use the sentencing grid to determine the length of imprisonment beyond the statutory minimum.

----------End Footnotes----------



In *Taylor v. United States, 495 U.S. at 596-600*, the Supreme Court considered whether the defendant's prior burglary convictions qualified for enhancement under § 924(e) despite the defendant's contention that the convictions did not involve conduct that presented a serious potential risk of physical injury to another. The United States Court of Appeals for the Eighth Circuit had rejected Taylor's argument, ruling that[**14] the word burglary in § 924(e)(2)(B)(ii) "means 'burglary' however a state chooses to define it." *United States v. Taylor, 864 F.2d 625, 627 (1989)*. The Supreme Court disagreed, concluding that [HN8] predicate offenses under the ACCA are "crimes having certain common characteristics--the use or threatened use of force, or the risk that force would be used--regardless of how they were labeled by state law." *Taylor, 495 U.S. at 589*. The Court called this focus on crimes having certain specified elements or common characteristics a "categorical approach," which the Court attributed to Congress. In order to implement the categorical approach in Taylor, the Court concluded that Congress "had in mind a modern 'generic' view of burglary, roughly corresponding to the definitions of burglary in a majority of the States' criminal codes." Id. The court found that definition to be the following: "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id. at 598*.

Having settled upon the generic definition of burglary intended by Congress in the ACCA, the Court turned to a second[**15] question in Taylor: "whether, in the case of a defendant who has been convicted [*63] under a nongeneric-burglary statute [e.g. one that includes places, such as automobiles and vending machines, other than buildings], the Government may seek enhancement on the ground that he actually committed a generic burglary." *Id. at 599-600*. In addressing that question, the Court again invoked the categorical approach intended by Congress. It noted that "the practical difficulties and potential unfairness of a factual approach are daunting," *id. at 601*, and concluded that the categorical approach to the nongeneric burglary statute "requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense." *Id. at 602*.

Then the Court immediately offered a qualification to the rule it had just announced:

This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary. For example, in a State whose burglary statutes include entry of an automobile as[**16] well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.

Id. This qualification permits a court to consider the charging document and jury instructions and to conclude that the fact of conviction necessarily means conviction of the generic crime of burglary included in the ACCA. n6

----------Footnotes----------

n6 In addition to specific crimes such as burglary, arson, and extortion, [HN9] the Armed Career Criminal Act defines as a "violent felony" a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *18 U.S.C. § 924*(e)(2)(B). We have regarded the Taylor categorical approach for burglary as applying to other kinds of felonies that may qualify as violent under the "otherwise" clause. See *United States v. Sacko, 178 F.3d 1, 7 (1st Cir. 1999)*.

----------End Footnotes----------

[**17]

In Taylor, however, the Court did not address the extent to which a sentencing court can go beyond the fact of conviction, for the purpose of determining an ACCA enhancement, when a defendant has pled guilty to a charge based on a statute that includes both violent and non-violent offenses within the meaning of the ACCA. That is the issue we have addressed in our precedents, n7 and to which we now turn.

----------Footnotes----------

n7 To be precise, our precedents address this issue in the context of both the Guidelines' career offender enhancement for crimes of violence and the Armed Career Criminal Act's enhancement for violent felonies. [HN10] The career offender enhancement applies if the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." See U.S.S.G. § 4B1.1. The commentary to U.S.S.G § 4B1.4 states: "It is to be noted that the definitions of 'violent felony' and 'serious drug offense' in *18 U.S.C. § 924*(e)(2) are not identical to the definitions of "crime of violence" and "controlled substance offense" used in § 4B1.1 (Career Offender) . . . ." U.S.S.G § 4B1.4, cmt.n.1. Despite the differences between § 4B1.1 and § 924(e)(2), the categorical approach applies to both provisions and we may look to the § 4B1.1 cases to elucidate the nature of the categorical inquiry. See, e.g., *United States v. Meader, 118 F.3d 876, 882 (1st Cir. 1997)*(although Taylor's narrow exception may apply to cases that come under the "otherwise" clause of § 4B1.2, "the standard approach for determining whether a particular crime fits within the 'crime of violence' rubric is a generic one, in which inquiry is restricted to the statutory definitions of the prior offense, without regard to the particular facts underlying them"); *United States v. Winter, 22 F.3d 15, 18 (1st Cir. 1994)*("Determining whether a previous conviction represents a crime of violence necessitates a formal categorical approach.").

----------End Footnotes----------

[**18]

B. The Categorical Approach and the Guilty Plea

Not surprisingly, our precedents separate into two strands that reflect the two distinct questions addressed by the Supreme [*64] Court in Taylor. We will discuss them accordingly.

1. Whether the Applicable State Statute Defines a Violent Felony or a Crime of Violence

As we noted, the Taylor Court first decided what common elements of burglary would make it a violent felony under the ACCA. In *United States v. Damon, 127 F.3d 139 (1st Cir. 1997)* and in *United States v. Sacko, 178 F.3d 1 (1st Cir. 1999)*, the comparable question was whether the statutory offenses at issue in those cases constituted a crime of violence within the meaning of the Guidelines (Damon) or a violent felony within the meaning of the ACCA (Sacko). This was a general definitional question that did not depend on documents specific to that case.

In Damon, we considered the district court's use of a PSR to determine whether a Maine conviction for aggravated criminal mischief constituted a "crime of violence." The charging document indicated that Damon was convicted under subsection B of the statute, which[**19] applies to a person who intentionally or knowingly damages or destroys property valued at over $2,000 in order to collect insurance proceeds. See *Damon, 127 F.3d at 142-43*. Thus, "the inquiry is whether the elements of subsection B fit the definition of a crime of violence under U.S.S.G. § 4B1.2(1)(ii)." *Id. at 143*. We looked to the "mine run of conduct" that the statute was intended to cover and concluded that "the typical conduct reachable under subsection B does not involve a serious potential risk of physical injury to another." *Id. at 143-44*. We concluded that the district court erred by considering the fact that the defendant set fire to his house to collect insurance proceeds because "under Taylor, when the predicate statutory crime has been determined to be typically non-violent, the inquiry ends." *Id. at 145*.

In Sacko, we concluded that the district court erred by considering the statement in the PSR that the defendant's prior statutory rape conviction involved non-consensual intercourse. That consideration involved the very reliance proscribed by Taylor--reliance on "the facts of Sacko's crime[**20] in order to determine whether his conviction was for a violent or a non-violent crime," *Sacko, 178 F.3d at 5*. We held that under the categorical approach, the proper inquiry was whether the category of the offense, statutory rape of a fourteen year-old, constituted a violent felony. We noted that there was "no legal basis . . . no studies or medical journals" to ground a holding that intercourse with an adult is physically dangerous for a fourteen-year-old female. *Id. at 6*. We remanded the case to the district court to take evidence on this issue.

Both Damon and Sacko posed the definitional question whether the statutory offenses at issue constituted a crime of violence under the career offender guideline (Damon) or a violent felony within the meaning of the ACCA (Sacko). n8 There [*65] was no uncertainty about whether a violent or non-violent offense encompassed within a statute was involved in the fact of conviction. As we noted in Damon, such cases do not "raise the question of what documents beyond the charging document or the jury instructions may be examined to determine which subsection of the multi-faceted crime is involved. [**21] The question about what subsection or type of statutory crime is involved is resolved here by the charging document." *127 F.3d at 144 n.5*.

----------Footnotes----------

n8 Our circuit addressed related definitional questions in two other cases, *United States v. Winter, 22 F.3d 15 (1st Cir. 1994)* and *United States v. Meade, 175 F.3d 215 (1st Cir. 1999)*.

In Winter, the issue before the court was whether racketeering, conspiracy to commit racketeering, travel in aid of racketeering, and sports bribery qualified as predicate crimes of violence under the career offender guideline. Because physical force is not an element of any of these offenses, we asked whether, from a categorical standpoint, any of them could be said to pose "serious risk of physical injury," as the guideline required. Following Taylor, we cautioned that "the court should not plunge into the details of a particular defendant's conduct," but, rather, "should merely assess the nature and object of the racketeering activity as described in the indictment and fleshed out in the jury instructions." *Winter, 22 F.3d at 19*.

Meade involved the question of whether the defendant's misdemeanor conviction for spousal assault, under a general assault and battery statute, qualified as a misdemeanor crime of domestic violence. The court construed the underlying statute to determine that the conviction did so qualify, rejecting the defendant's argument that Taylor's categorical approach should extend so far as to prevent courts from establishing the elements of the statute of conviction. See *Meade, 175 F.3d at 221*.

----------End Footnotes----------

[**22]

2. Whether the Fact of Conviction was for a Violent or Non-Violent Felony When the Applicable State Statute Encompasses Both

The second question addressed in Taylor was whether a conviction under a nongeneric burglary statute, which included violent and nonviolent offenses, could be a conviction for a predicate offense under the ACCA. In *United States v. Harris, 964 F.2d 1234 (1st Cir. 1992)* and *United States v. Dueno, 171 F.3d 3 (1st Cir. 1999)*, we addressed a comparable question. There was no definitional uncertainty in those cases about whether a statutory offense constituted a violent crime. Instead, the uncertainty was whether the fact of conviction related to a violent crime or a nonviolent crime. As we recognized, that uncertainty could only be resolved by considering case specific documents.

In Harris, the defendant pled guilty to a Massachusetts assault and battery statute which covered both actual or potential physical harm and unharmful but nonconsensual touching. We acknowledged the general rule under Taylor that when the statute encompasses violent and non-violent conduct, the sentencing court should look to[**23] the indictment and information or jury instructions to make the violent felony determination. However, we recognized that Harris's case posed a further question: "What . . . should a court do when there are no jury instructions to look at . . . because the defendant pled guilty?" *Harris, 964 F.2d at 1235*. In answer to that question, we said the sentencing court should:

> look to the conduct in respect to which the defendant was charged and pled guilty, not because the court may properly be interested . . . in the violent or non-violent nature of that particular conduct, but because that conduct may indicate that the defendant and the government both believed that the generically violent crime . . . rather than the generically non-violent crime . . . was at issue.
>
> *Id. at 1236*.

We concluded in Harris that "the record before us provides adequate information to make the required determination relatively simply." Id. In particular, we considered a PSR which recited facts from the case file revealing that both of the defendant's assault and battery convictions involved violent beatings. *Id. at 1236-37*. We found the[**24] PSR to be a reliable source for establishing whether the defendant pled guilty to a violent crime because the basic facts alleged in the PSR--i.e., that the defendant perpetrated a violent assault--were "uncontested and uncontradicted." *Id. at 1237*. Given the PSR's uncontradicted account of the defendant's conduct, we concluded "that the defendant and the government both believed" that a generically violent crime was the basis for the defendant's guilty pleas. *Id. at 1236*.

In *United States v. Dueno, 171 F.3d 3, 6-7 (1st Cir. 1999)*, despite strong urging from the defendant, we refused to retreat from Harris's limited inquiry into conduct "in respect to which the defendant was charged and pled guilty." *Dueno, 171 F.3d at 5* (analyzing the Guidelines' career offender enhancement). As here, Dueno involved a predicate Massachusetts breaking and entering conviction memorialized [*66] by a judgment which was ambiguous as to whether the defendant broke into or entered a building or a vehicle. See *id. at 5*. On appeal, the government conceded that the district court had engaged in erroneous reasoning in concluding[**25] that the conviction was for breaking into and entering a building, n9 but urged us to sustain the enhancement on the ground that Dueno never contradicted the PSR's account of the break-in, which described a building invasion See *id. at 6*. Although we regarded the issue as "close," we declined to affirm on the government's alternative ground and instead remanded. *Id. at 7*. Applying Harris, we concluded that "on the present record, a reasonable jurist could conclude that there is insufficiently reliable evidence to ground a finding that Dueno pleaded guilty to breaking into and entering a building." *Id. at 7*. Specifically, we noted several problems with the evidence presented to the sentencing court. First, instead of offering the police report from which the facts were taken, the government offered only the PSR which incorporated facts from the police report. Second, the evidence did not include "a single document that was before the judge who accepted Dueno's plea." *Id. at 7*. Third, there was no account of what took place at Dueno's plea hearing.

----------Footnotes----------

n9 The court had accepted the government's argument that a second charge in the complaint for destruction of property, which alleged harm to "the personal property, dwelling, house or building of [the victim]," established that Dueno broke into and entered a building, and thus committed a crime of violence. On appeal, the government conceded that this description could refer to unlawful entry and vandalism of a vehicle as much as to destruction of property related to breaking and entering into a building. See *Dueno, 171 F.3d at 5-6*.

----------End Footnotes----------

[**26]

At the conclusion of Dueno, we said the following:

> Dueno's sentence for this crime can reflect only those prior crimes of which he has been convicted -- either by a trier of fact or by his own admission. As matters now stand, the evidence is insufficient for us to conclude, as a matter of law, that Dueno's 1994 guilty plea constituted an admission to the building invasion described by the police report.

*Dueno, 171 F.3d at 7* (emphasis added). In its decision in this case, the district court relied on the language we emphasize. Although the court's reliance on this language is understandable, that reliance nevertheless reflects a misapplication of Harris, reaffirmed by the Dueno decision, and of Dueno itself.

C. Consideration of Police Reports and Complaint Applications

Dueno's reference to an admission by the defendant cannot be read apart from the inquiry framed in Harris: looking to the conduct in respect to which the defendant was charged and pled guilty, did "the defendant and the government both believe[] that the generically violent crime . . . rather than the generically non-violent crime . . . was at[**27] issue." *Harris, 964 F.2d at 1236*. In fact, having reaffirmed Harris, Dueno describes the sentencing court's inquiry into the meaning of the defendant's guilty plea in a specific sense that reflects Harris--does the defendant's plea of guilty "constitute an admission" to a crime of violence? See *Dueno, 171 F.3d at 7* ("the evidence is insufficient for us to conclude, as a matter of law, that Dueno's 1994 guilty plea constituted an admission to the building invasion described by the police report") (emphasis added). The court's determination on the violent felony or crime of violence question does not turn on an explicit admission by the defendant to alleged conduct in the sense of "yes, I struck the victim in the face," either at the time the defendant pled guilty to the earlier offense or when the enhancement issue arises at sentencing for a subsequent offense. Rather, the court's determination about the meaning of the guilty plea can be made on the basis of sufficiently reliable evidence independent of a fact-specific admission. See *United States v. Broce, [*67] 488 U.S. 563, 570, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989)* ("By[**28] entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.").

Nevertheless, Harris and Dueno leave open the question of what documents are sufficiently reliable evidence for determining whether a defendant's plea of guilty constitutes an admission to a generically violent crime under a statute that encompasses violent and non-violent conduct. In Harris, we allowed the district court to rely on an uncontradicted PSR. In Dueno, where the court had used faulty reasoning in making its crime of violence determination, we declined to rule that the uncontradicted narration of events in the PSR established that Dueno had pled guilty to a crime of violence. Rather, in concluding that the issue reasonably could be decided either way, we pointed out that the government did not offer the police report from which the facts in the PSR were taken, nor any other document that was before the judge who accepted Dueno's plea.

Here, noting the deficiencies cited in Dueno, the government offered certified copies of police reports and complaint applications. Based on our precedents, [**29] we see no justification for an absolute bar to the consideration of such documents when the sentencing court must determine whether the defendant and the government both believed that the defendant was entering a guilty plea to a generically violent crime. n10 Such a bar would make the use of prior convictions based on guilty pleas for purposes of the ACCA or criminal offender guideline enhancement hinge on the happenstance of state court record-keeping practices. The enhancement would only apply when a plea agreement or a plea transcript had been preserved that showed a defendant pled guilty to a violent felony or a crime of violence. Indeed, in Dueno, where we could have easily adopted a bright-line rule barring the use of police reports, we did not. We noted instead the absence in the record of "a copy of the police report in question" or of "an explanation where the police report came from." *Dueno, 171 F.3d at 7*. These specific deficiencies made the PSR account insufficiently reliable for us to determine as an initial matter and as a matter of law that Dueno pled guilty to breaking and entering into a building.

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n10 Other circuits have not addressed the precise question of whether police reports and complaint applications are reliable evidence for determining whether a defendant has pled guilty to a violent crime when the statute under which he is charged addresses violent and non-violent conduct. Some courts, however, have allowed consideration of documents such as PSRs, plea agreements, and plea transcripts. See *United States v. Bonat, 106 F.3d 1472, 1476 (9th Cir. 1997)* (district court properly relied on plea transcript to determine whether defendant pled guilty to generic burglary); *United States v. Adams, 91 F.3d 114, 116 (11th Cir. 1996)* (district court properly considered PSR to determine whether defendant's prior conviction was for generic burglary); *United States v. Hill, 53 F.3d 1151, 1154 (10th Cir. 1995)* (en banc), cert. denied, *516 U.S. 900, 133 L. Ed. 2d 182, 116 S. Ct. 258 (1995)* (district court may consider text of guilty plea and/or other documents that, coupled with the charging instrument, enable the court to determine that defendant's prior conviction was for generic burglary); *United States v. Gallman, 907 F.2d 639, 645 n.7 (7th Cir. 1990)*, cert. denied, *499 U.S. 908, 113 L. Ed. 2d 219, 111 S. Ct. 1110 (1991)* (district court should refer to plea agreement or plea transcript to determine whether defendant's prior conviction was for generic burglary). But see *United States v. Barney, 955 F.2d 635, 639 (10th Cir. 1992)* ("we do not hold . . . that the sentencing court determining enhancement may rely on the presentence report").

----------End Footnotes----------

[**30]

The district court in this case did not attempt to evaluate the reliability of the police reports and complaint applications as a basis for the finding contemplated by both Harris and Dueno--whether the defendant and the government both believed that Shepard was entering guilty pleas to the generically violent crime of [*68] breaking and entering a building. In addressing that issue, the court should have asked the kind of questions suggested by our precedents. As discussed in Dueno, did the court taking the guilty plea have before it the police reports and complaint applications described in the PSR, or any other documents describing the defendant's conduct? Where did the police reports come from? What took place at Shepard's plea hearings? More specifically, as discussed in Harris, did the defendant provide anything at his plea hearings to contest the facts set forth in the police reports and complaint applications, thereby suggesting that the government and the defendant did not share an understanding that he was pleading guilty to an offense that had the elements of a generically violent crime? We cite these questions from our precedents as illustrative of the kind of[**31] inquiry that should be made. They are not offered as an exhaustive list.

The reference above to a defendant's contesting the facts set forth in a police report requires us to address a

confusion relating to the concept of an admission when the enhancement issue arises at sentencing. The district court stated that "if the relevant facts contained in the PSR are uncontested, the court may consider these as further admissions by the defendant." See also *Dueno, 171 F.3d at 7; Harris, 964 F.2d at 1236-37.* That statement is accurate. Such admissions would be important for the reasons they were important in Harris:

These two items of uncontested and uncontradicted information make clear that neither of the two "assault and battery" crimes for which Harris was charged and convicted were "nonconsensual touching" crimes, and both were of the "physically harmful" or "potentially physical harmful" variety.

*Harris, 964 F.2d at 1237.* These admissions during the sentencing process are an example of reliable evidence that would permit a sentencing court to conclude that the defendant's guilty plea to a prior offense constituted[**32] an admission to a generic violent felony or crime of violence. But it does not follow from this proposition that any objection posed by a defendant at the time of sentencing to the facts set forth in a PSR, or in an underlying police report or complaint application, precludes the court from finding that the defendant's guilty plea constituted such an admission. Such a result would be inconsistent with the preponderance of the evidence standard that generally applies when a court determines whether a defendant qualifies for an enhancement under the ACCA or career offender provision. See *United States v. Spell, 44 F.3d 936 (11th Cir. 1995).*

Therefore, the nature of the objection posed to a PSR, or to underlying documents relied upon by the government, must be considered carefully. The district court suggests that Shepard contested the accuracy of the facts in those documents that are relevant to whether he committed a generically violent crime. "At no point--then or now, during the various plea colloquies, or at this sentencing--did Shepard concede the facts on which the government now relies. Indeed, Shepard expressly contested any characterizations of these convictions [**33]that went beyond the words of the complaint." However, Shepard's Taylor-based categorical objection to the use of the complaint applications and police reports does not challenge the accuracy of the statements in those documents describing entries into buildings. Shepard stated that these documents generally carry a high risk of unreliability without ever explaining why that was true in his case. Shepard's general challenge to the appropriateness of the PSR setting forth accounts of his past crimes, or to the reliance on police reports and complaint applications for those accounts, left those accounts uncontradicted, just as they were in Harris and Dueno.

We cannot anticipate the specific objections that Shepard might pose to the government's documents. We can emphasize, however, that the issue before the [*69]sentencing court is not what Shepard did to provoke the criminal charges to which he pled guilty. Rather, the issue, again, is the one framed in Harris: did the defendant and the government both believe at the time Shepard entered his pleas "that the generically violent crime . . . rather than the generally non-violent crime . . . was at issue." *Id. 964 F.2d at 1236.* [**34]To conclude otherwise would enmesh the district court in the kind of factually disputed "archeological dig" about the defendant's conduct that Taylor guards against, with all the attendant practical difficulties of holding mini-trials on a defendant's prior convictions. See *Winter, 22 F.3d at 19.*

Shepard's objections to the government's police reports and complaint applications might focus, for example, on any inconsistencies or ambiguities in their description of the defendant's conduct, or any circumstances relating to the creation or reproduction of the documents, that affect their usefulness for determining whether Shepard and the government both believed that an entry into a building was at issue when he entered the guilty pleas. Or Shepard might offer an account of what took place at his plea hearings, including the documents before the judge, that raises questions about that issue. If the government needs to respond to such objections, the response should usually be "limited to examining easily produced and evaluated court documents, including the judgment of conviction, charging papers, plea agreement, presentence report adopted by the court, and the findings[**35] of a sentencing judge." *Spell, 44 F.3d at 939.* To that list we add transcripts of the plea hearing or other documents that were before the judge who accepted the guilty plea at issue.

In the face of plausible objections from Shepard, and in the absence of a sufficient response from the government, the court may decide that it cannot conclude by a preponderance of the evidence that his pleas of guilty constituted admissions to unlawful entries into buildings. [HN11] The government, of course, "bears the burden of proving the applicability of an upward adjustment under the guidelines [or the ACCA]," *Dueno, 171 F.3d at 7.*

III.

In Taylor, the Supreme Court said that the sentencing court could go beyond the mere fact of conviction "in a narrow range of cases where a jury was actually required to find all the elements of generic burglary." *Taylor, 495 U.S. at 602.* By examining the indictment or information and jury instructions in such cases, the court could conclude "that the jury necessarily had to find" that the defendant had been convicted of the violent felony of entry into a building, i.e. a violent felony. Id.

The concept[**36] of a necessary finding does not apply to disputes about the meaning of a defendant's guilty plea, and whether that plea constitutes an admission to a violent felony or a crime of violence. As we have indicated, those disputes must be resolved by a finding of fact pursuant to the preponderance of the evidence standard. Such a finding is not a necessity. It is based on a judgment about the weight of the evidence.

Without minimizing the high stakes involved in sentencing enhancements, we note that courts routinely resolve factual disputes during sentencing hearings. We see no reason why disputes about the meaning of a defendant's guilty plea should be immune from that process, so long as the inquiry is consistent with the principles of Taylor. We believe that we have described such an inquiry here.

In Taylor, the Supreme Court explained why it would be unfair for a sentencing court to look to the facts underlying the prior conviction to determine if a defendant had pled guilty to a violent felony. "Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to [*70]impose a sentence[**37] enhancement as if the defendant had pleaded guilty to burglary." *Taylor, 495 U.S. at 601-02.* We, of course, agree. It would be decidedly unfair to determine subsequently, for the purpose of sentence enhancement under the ACCA or the career offender guideline, that the conviction resulting from a guilty plea was for a violent crime, based on the actual conduct of the defendant, when the defendant in fact pled guilty to a non-violent crime. But we see no unfairness in a court deciding on the basis of sufficiently reliable evidence that the government and the defendant shared the belief that the defendant was pleading guilty to a generically violent crime, and hence the defendant's plea constituted an admission to such a crime.

We also see no unfairness in a point emphasized by the district court in its decision rejecting consideration of the police reports and complaint applications--namely, that Shepard had no appreciation of the importance of challenging the location of the breaking and entering when he pled guilty to the breaking and entering charges in the Massachusetts courts because he could not anticipate that his convictions for these charges would be so important [**38]for subsequent sentencing under the ACCA. Logically, the premise of this concern is that Shepard would have tried to minimize his criminal history because of the possibility that he would commit another crime. We do not find persuasive a fairness argument grounded in such a premise. [HN12] Sentencing enhancements do not punish a defendant for the prior criminal conduct. See *Nichols v. United States, 511 U.S. 738, 747, 128 L. Ed. 2d 745, 114 S. Ct. 1921 (1994)* ("Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction."). Rather, enhancements provide for "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger v. Burke, 334 U.S. 728, 732, 92 L. Ed. 1683, 68 S. Ct. 1256 (1948).*

In summary, the court below concluded that it could not consider the police reports and complaint applications offered by the government because of its erroneous view that the violent felony determination could only be[**39] based on adjudicated or specifically admitted facts. The court did not carry out the required analysis of whether the documents before it constituted sufficiently reliable evidence of the government and the defendant's shared belief that the defendant was pleading guilty to the unlawful entry of a building. We therefore vacate the sentence and remand for resentencing.

Vacated and remanded.

UNITED STATES OF AMERICA, v. REGINALD SHEPARD, Defendant.
Crim. No. 98-10262-NG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OFMASSACHUSETTS

125 F. Supp. 2d 562; 2000 U.S. Dist. LEXIS 20106

January 20, 2000, Decided

DISPOSITION: **[**1]** Court departed up two levels, to an offense level of 14. Court sentenced Shepard to 46 months in prison, with three years supervised release. Court recommended that Shepard participate in the 500 hour Intensive Drug Treatment program in the Bureau of Prisons and directed him to send periodic reports to court of his progress.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant pleaded guilty to one count of being a felon in possession of a firearm. Two sentencing hearings were held. The Government asked his sentence be enhanced for his being an Armed Career Criminal, based on police reports and complaint applications, and also because of the number and nature of his prior convictions.

OVERVIEW: Defendant pleaded guilty to being a felon in possession of a firearm. At the time of the offense, he had a number of prior state criminal convictions for breaking and entering. The government argued that at least five were "violent felonies" under the Armed Career Criminal Act, because they qualified as burglaries under *18 U.S.C.S. § 924*(e)(2), and also sought an upward departure pursuant to U.S. Sentencing Guidelines Manual § 4A1.3, based on the seriousness of his criminal history. The court was concerned with how far it could look beyond the language of the indictment to determine the character of prior convictions. It found defendant was not an armed career criminal but did depart upward two levels, for a base offense level of 14, under to U.S. Sentencing Guidelines Manual § 2K2.1(a)(6)(A), having recognized his guilty plea entitled him to a 2-level reduction under U.S. Sentencing Guidelines Manual § 3E1.1(a). His total offense level and criminal history category yielded a sentencing range of 37-46 months. He was sentenced to 46 months to qualify him for the prison's 500-hour drug treatment program.

OUTCOME: Defendant was not an Armed Career Criminal. Evaluating only his formal record of convictions, the number, timing, and nature suggested his culpability and likelihood of recidivism, so the court departed upward two levels, to an offense level of 14, sentenced him to 46 months and three years supervised release, and recommended he participate in a 500-hour Intensive Drug Treatment program.

CORE TERMS: sentence, breaking and entering, burglary, criminal history, departure, sentencing, upward, categorical, guideline, vessel, intent to commit, firearm, felony, house of correction, shoplifting, trespassing, ship, sentenced, convicted, imprisonment, threatening, generic, violent felony, breaking, motor vehicle, indictment, larceny, score, night time, peek

LexisNexis (TM) HEADNOTES - Core Concepts:

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN1] Under the U.S. Sentencing Guidelines Manual § 2K2.1(a)(6)(A), the base offense level will be 14 if the defendant is a "prohibited person." A "prohibited person" is defined to include anyone who is under indictment for, or has been convicted of, a crime punishable by imprisonment for more than one year.

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass
[HN2] See *Mass. Gen. Laws ch. 266, § 16* (1990).

Criminal Law & Procedure: Criminal Offenses: Property Crimes: Burglary & Criminal Trespass
[HN3] See *Mass. Gen. Laws ch. 266, § 18* (1990).

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
Criminal Law & Procedure: Sentencing: Criminal History: Three Strikes
[HN4] Pursuant to U.S. Sentencing Guidelines Manual § 4B1.4 and *18 U.S.C.S. § 924*(e), a defendant is determined to be an armed career criminal if the following conditions exist: (1) the instant offense of conviction is a violation of *18 U.S.C.S. § 922*(g); and (2) the defendant has at least three prior convictions for a "violent felony" or "serious drug offense" committed on occasions different from one another.



Criminal Law & Procedure: Sentencing: Criminal History: Three Strikes
[HN5] See *18 U.S.C.S. § 924*(e)(2).

Criminal Law & Procedure: Sentencing: Imposition: Factors
[HN6] A sentencing court should narrow its inquiry to the fact of conviction, and whether the statute of conviction included the generic elements, rather than examining the facts underlying the convictions. This is dubbed the "categorical" approach.

Criminal Law & Procedure: Sentencing: Imposition: Factors
[HN7] If a defendant was convicted after a trial, the sentencing court is permitted to consider what the jury instructions suggested about the verdict. If the defendant pled, the court may consider what he admitted to at his plea. Finally, if the relevant facts contained in the Presentence Report are uncontested, the court may consider these as further admissions by the defendant.

Criminal Law & Procedure: Sentencing: Criminal History: Three Strikes
[HN8] A defendant's past criminal conduct is directly relevant to the purposes of sentencing: An individual with a record of criminal behavior is more culpable than a first offender. Moreover, "general deterrence" requires that a message be sent that repeated criminal behavior will aggravate the punishment. Finally, a criminal record is correlated with recidivism on the one hand, and the limited likelihood of rehabilitation on the other.

Criminal Law & Procedure: Sentencing: Criminal History: Three Strikes
[HN9] For the most part, for sentencing purposes the criminal history score is keyed to the length of the sentence that the individual received in state court. Presumably, the longer the sentence, the more serious the underlying conduct must have been. Category VI, however, is the highest category, reserved for anyone with a criminal history score of 13 or more.

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN10] In calculating the appropriate offense level when the Criminal History Category is already VI, the U.S. Sentencing Guidelines Manual instructs the court to depart by moving incrementally down the sentencing table to the next higher offense level until it finds the range appropriate for the case. U.S. Sentencing Guidelines Manual § 4A1.3.

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN11] In determining "appropriateness" of a sentence, the court is guided by the statute creating the Federal Sentencing Guidelines, the Sentencing Reform Act. It directs the court to impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth. *18 U.S.C.S. § 3553*(a).

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN12] The Bureau of Prisons considers only the amount of time in its custody in calculating the prerequisites for the intensive drug treatment program. A guidelines sentence, minus the amount already served in pre-trial detention, will not suffice.

Criminal Law & Procedure: Sentencing: Sentencing Guidelines Generally
[HN13] See *18 U.S.C.S. § 3553*(a)(2).

COUNSEL: For REGINALD SHEPARD, Defendant: Linda J. Thompson, Jacobson & Thompson, P.C., Springfield, MA.

U. S. Attorneys: Nadine Pellegrini, United States Attorney's Office, Boston, MA.

JUDGES: NANCY GERTNER, U.S.D.J.

OPINIONBY: NANCY GERTNER

OPINION: **[*562]**

SENTENCING MEMORANDUM

January 20, 2000**[*563]** Reginald Shepard ("Shepard") pleaded guilty to one count of Felon in Possession of a Firearm, in violation of *18 U.S.C. § 922*(g). At the time of the offense, Shepard had a number of prior state criminal convictions for breaking and entering. The government argued that at least five of these convictions were "violent felonies" within the meaning of the Armed Career Criminal Act ("ACC") because they qualified as "burglaries" under *18 U.S.C. § 924*(e)(2). See U.S.S.G. § 4B1.4. Shepard disagreed. The resolution of this dispute was critical: **[**2]** Shepard faced an increase in his sentence of approximately twelve years if I adopted the government's position. n1

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n1 Under U.S.S.G. § 4B1.4, Shepard's sentencing range would increase considerably from 30-37 months to 188-235 months.

----------End Footnotes----------

The substantive issue, whether Shepard's breaking and entering convictions constitute "burglaries," raised an even more fundamental one -- how far may a court look beyond the language of the indictment to which the defendant pled guilty or of which he was convicted, to determine the character of a defendant's prior convictions.

The Sentencing Guidelines and the ACC attach substantial penalties not merely to the fact of a prior record, but to the nature of that record. Since these extraordinary consequences were never anticipated when the defendant pled guilty or was convicted in state court, they were never adjudicated by a court or jury, much less admitted to by the defendant. A sentencing court has two choices: On the one hand, she can look only to the formalities of[**3] the record -- the language of the indictment to which the defendant pled, the meaning of the jury verdict as interpreted by the jury instructions -- or the facts which the defendant admitted. On the other hand, she can try to evaluate the record post hoc, without the safeguards of a trial, to determine what the offense was "really" about -- what the police report says, what the complaint application indicated.

Both the First Circuit and the Supreme Court have chosen the former. It plainly saves judicial resources. It avoids the legal equivalent of an archeological dig into past records. More importantly, it is by far the fairest approach. As a general matter, we, as a society, reject punishing someone based on facts that were never adjudicated, particularly where the defendant had no idea that the facts would have this added resonance. As I describe below, based on the formal record, I concluded that Shepard did not qualify as an A ned Career Criminal.

But concluding that Shepard did not qualify as an Armed Career Criminal did not mean that his substantial record would be ignored. The government also moved for an upward departure pursuant to U.S.S.G. § 4A1.3 (p.s.) based on[**4] the seriousness [*564] of Shepard's criminal history. n2 Again, evaluating only the formal record of Shepard's convictions, I found that the number of convictions, their timing, and their nature, all suggest that Shepard's criminal history understated his culpability and the likelihood, of his recidivism. Accordingly, an upward departure was warranted.

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n2 Indeed, the government did so at my invitation. After I indicated that I was not inclined to find Shepard an Armed Career Criminal, I invited the government to move for an upward departure, to be argued at a second sentencing hearing.

----------End Footnotes----------

Two hearings were held. The first, on July 7, 1999, focused on the ACC issue. The government asked the Court to accept facts taken from police reports and complaint applications as evidence to support its argument that at least five of Shepard's breaking and entering convictions were really burglaries (and thus "violent felonies") for purposes of the ACC enhancement. The second, on July 14, 1999, focused on the upward departure issue. [**5] The government urged the Court to consider the number, and "sheer industrious nature," of Shepard's prior convictions in enhancing his sentence. It then sought a sentence which, in effect, would have achieved the same result as an ACC finding.

In its objections to the pre-sentence report, Shepard opposed any factual recitations beyond the face of the complaints and specifically, any reference to police reports and complaint applications.

I departed upward by two levels. I sentenced Shepard to a term of imprisonment of forty-six months, followed by three years of supervised release. Furthermore, I ordered that Shepard participate in a 500 hour Comprehensive Drug Treatment Program, and attend a Batterer's Intervention Program.

I. GUIDELINE CALCULATIONS

Base Offense Level:

The base level under U.S.S.G. § 2K2.1(a)(6)(A) is 14. n3

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n3 [HN1] U.S.S.G. § 2K2.1(a)(6)(A) provides that the base offense level will be 14 if the defendant is a "prohibited person." A "prohibited person" is defined to include anyone who, like Shepard, is under indictment for, or has been convicted of a "crime punishable by imprisonment for more than one year." U.S.S.G. § 2K2.1 (App. Nt. 6)

----------End Footnotes----------

[**6]

Acceptance of Responsibility:

Due to Shepard's guilty plea, he is entitled to a 2 level reduction under U.S.S.G. § 3E1.1(a). Minus 2

Upward Departure:

As discussed below, I concluded that an upward departure of two levels to 14 was appropriate. Plus 2

Total Offense Level:

Shepard's total offense level of 14, and a criminal history category of VI, yields a sentencing range of 37-46 months. I sentenced him to the high end, at 46 months, and further, directed that he participate in a 500 hour Comprehensive Drug Treatment Program, and a Batterer's Intervention Program.

II. FACTS

A. Background

Shepard is a 37 year old man who has been involved with the criminal justice system for almost twenty years. As a young man, he witnessed his alcoholic father physically abuse his mother. Although his mother eventually kicked his father out when Shepard was 10 years old, she later became involved with another man who repeated the pattern, physically and emotionally abusing her, as well as Shepard and his sister. At age 16, Shepard finally moved out. He also withdrew from school, got a job as a security guard, and significantly, [**7] began using drugs.



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Shepard's history of abuse, and his continued use of cocaine and marijuana limited his capacity to keep a job, or to maintain positive relationships. In at least [*565] three of his relationships, drug use seemed to be what the couple shared most -- in a rooming house in Mattapan, a rented apartment in Hyde Park, a Dorchester home. At the same time, perhaps the other side of drug filled days, at least four of the women obtained restraining orders against him. n4

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n4 One of these orders was related to incidents involving Kathleen Cole, Shepard's present girlfriend. In May 1998, Shepard was arrested for, among other things, assault and battery of Kathleen Cole. According to a police report, Ms. Cole reported various acts of physical abuse from a man currently living in her house. This report lead to Shepard's arrest, but these charges were eventually dropped. Ms. Cole states that Shepard was not the man in her report.

----------End Footnotes----------

In 1988, Shepard tried to stop his drug habit by entering a rehabilitation program[**8] at Dimock Detoxification Center. After only six months of staying clean, however, he returned to drug use.

At sentencing, Shepard represented to the Court that he had voluntarily stopped using drugs since 1996. During part of that period, he was in the House of Correction. After his release in 1998, his girlfriend, Kathleen Cole, confirmed that he began attending Alcoholics Anonymous/Narcotics Anonymous ("A.A./N.A.") meetings. Shepard's family, who had largely rejected him because of his drug use, as I describe below, appeared in force at the sentencing hearing to buttress the claim that he had finally addressed his problem.

B. Criminal History

Since 1980, when he was 18 years old, Shepard has been on an 18-year crime spree. n5 But while lengthy, it is also the criminal history of a drug addict -- a series of opportunistic, seemingly unplanned crimes, involving inappropriate targets with little chance of success. He is

immediately apprehended; he pleads guilty and as soon as he is released, starts again."

----------Footnotes----------

n5 The longest continuous sentence Shepard received in the House of Correction was for two years in July 1991, for Breaking and Entering in the Daytime.

The convictions during this 18 year time period include charges filed on 5/23/80 (threatening); 11/4/80 (trespassing); 2/9/81 (breaking and entering and larceny); 7/20/81 (possession Class D); 11/15/84 (assault and battery on a police officer); 6/19/85 (operating to endanger and larceny of a motor vehicle); 3/8/87 (shoplifting and trespassing); 10/13/87 (automobile offenses); 5/27/88 (automobile offenses); 11/2/88 (shoplifting); 11/21/88 (shoplifting and trespassing); 12/7/88 (shoplifting and trespassing); 3/2/89 (shoplifting); 4/18/89 (breaking and entering); 5/9/89 (threatening and possession Class B); 5/18/89 (breaking and entering); 5/23/89 (breaking and entering); 7/12/89 (breaking and entering); 7/17/89 (trespassing); 7/27/89 (trespassing); 10/11/90 (breaking and entering and possession of burglarious tools); 3/11/91 (breaking and entering); 7/18/91 (breaking and entering); 1/25/93 (threatening, trespassing, and larceny); 7/9/93 (threatening and shoplifting); 2/4/94 (malicious destruction of property and breaking and entering); 5/23/94 (knowingly receiving stolen property and threatening); 11/9/95 (breaking and entering and larceny); 2/29/96 (breaking and entering and possession of burglarious tools); 5/4/98 (threatening and malicious destruction of property); and 5/12/98 (assault and battery).

----------End Footnotes----------

**[**9]**

1. The Breaking and Entering Convictions

Of particular importance to this case are Shepard's eleven convictions for breaking and entering, n6 at least five of which the government argues constitute burglaries. Probation and the defense disagreed, relying only on the language in the charging documents, the criminal complaints. n7 These complaints recite the boiler-plate language of the statutes, G.L. ch. 266 §§ 16, 18. And that language covers both **[*566]** breaking and entering into a commercial structure or dwelling, which is "generic burglary," as I describe below, and breaking and entering into a vehicle or vessel, which is not. n8

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n6 It is noted that one of these convictions -- February 9, 1981 -- was not scored for purposes of the Criminal History computation under U.S.S.G. § 4A1.2(e) (out of applicable time period).

n7 As these criminal cases were brought in Massachusetts District Court, Shepard was charged by Complaint, rather than by Indictment.

n8 [HN2] The relevant statutes provide:

Whoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony, . . . shall be punished by imprisonment in the state prison for not more than twenty years, or in a jail or house of correction for not more than two and one-half years.

*Mass. Gen. L. ch. 266 § 16* (1990). [HN3] Statute was amended in September 1995 to include "or vehicle" language.

Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or motor vehicle or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years.

*Mass. Gen. L. ch. 266 § 18* (1990). Statute was amended in November 1989, to include "or motor vehicle" language.

----------End Footnotes----------



**[**10]**

In an effort to prove the actual conduct involved, in particular the location of the crime (i.e. in a structure or a vehicle), the government supplied additional materials, such as complaint applications and police reports. While the Probation Department described the content of these materials in its amended Pre-Sentence Report ("PSR"), it did not alter its conclusion. It continued to maintain that it was bound to rely only on the formalities of the charges.

In each case, Shepard pleaded guilty to the generally worded complaint. Nothing suggested that the facts alleged in the complaint applications or the police reports were ever litigated, much less determined by a court or jury. At no point -- then or now, during the various plea colloquies, or at this sentencing -- did Shepard concede the facts on which the government now relies. Indeed, Shepard expressly contested any characterizations of these convictions that went beyond the words of the complaints.

a. April 18, 1989 n9

----------Footnotes----------

n9 Although the government's brief states that this crime occurred on May 8, 1989, the facts described suggest that it intended to discuss the event which passed on April 2, 1989.

In discussing this offense, the government relies on the PSR, and does not supply any additional documentation.

----------End Footnotes----------

**[**11]**

Shepard was sentenced to 18 months in the House of Correction, 6 months committed, and the balance suspended. The complaint stated that on April 2, 1989, the defendant "did break and enter in the daytime, the building, ship or vessel of Crispus Attucks Children's Center with the intent to commit a felony therein in violation of G.L. c. 266, § 18." The complaint application suggested that a building was involved, alleging that Shepard gained access to the Children's Center by breaking a window, and in so doing, he put the Director of the Center in fear.

b. May 23, 1989

The second conviction resulted in a 2 years suspended sentence and probation. On July 31, 1991, Shepard was found in violation of probation and committed to the House of Correction to serve his sentence. The complaint stated that on May 6, 1989, "the defendant did break and enter in the night time the building, ship, vessel, or vehicle, the property of Jerri Cothran, with intent to commit a felony therein, in violation of G.L. c. 266 § 16."

The complaint application and the Boston Police report implied that a home was involved. They alleged that Shepard gained entry by breaking down a cellar door, and**[**12]** was then observed inside the pantry by the owner of the house.

c. March 29, 1991

For this conviction, Shepard was committed to the House of Correction for one year. The complaint stated that on March 11, 1991, "the defendant did break and enter in the night time, the building, ship, vessel or vehicle the property of Fretters, **[*567]** with intent to commit a felony therein in violation of G.L. ch. 266 § 16."

The Watertown Police report suggested that the site was a commercial building. The report stated that two managers of Fretters were in the stockroom when they observed the back door open and Shepard enter. According to both employees, the door was locked, and they believed that to enter, Shepard used a key that he did not return to the store following his termination from employment there several weeks before.

d. July 18, 1991

On this conviction Shepard was sentenced to two years in the House of Correction. The complaint stated that on July 18, 1991, "the defendant did break and enter in the day time the building, ship or vessel of Monica Collins with the intent to commit a felony therein, in violation of G.L. ch. 266 § 16."

The Boston Police report alleged that**[**13]** the officers responded to a radio call about a suspect in the hallway of a particular apartment building in Dorchester. Upon arrival, the officers observed Shepard walking away from the area carrying items from a particular apartment. Officers found that a panel on the third floor,

front door had been broken, exposing the inside door lock.

e. February 4, 1994

The final conviction resulted in a two year sentence, six months committed and the balance suspended. The complaint set forth that on February 3, 1994, "the defendant did break and enter in the day time the building, ship or motor vehicle or vessel of Russell McGaugh with intent to commit a felony therein, in violation of G.L. ch 266 § 18."

The police report stated that Shepard was observed attempting to gain entry into the stated address by turning several doorknobs. A police officer went to the rear of the property and observed Shepard, with both hands through the glass partition, attempting to gain entry through another door. Upon seeing the police officer, Shepard fled, but was soon apprehended and placed under arrest.

2. The Remainder of Shepard's Record

Until the incident leading to the instant[**14] plea to Felon in Possession of a Firearm, Shepard was never charged with, or convicted of any crime involving the use or possession of a weapon. No weapon appears to have been involved in any of his prior offenses. Indeed, the vast majority of his offenses are within the jurisdiction of the state district court, for trespass, larceny, receiving stolen property, shoplifting, as well as breaking and entering.

C. This Incident

On October 17, 1995, an Alcohol, Tobacco and Firearms ("ATF") agent, acting in an undercover capacity, met Shepard regarding a prearranged deal to sell firearms. During the meeting, which was recorded on tape, Shepard completed a hand-to-hand sale of a Glock 17, 9 mm pistol for $600.00, and various rounds of ammunition for an additional $20.00. On March 3, 1999, Shepard entered a plea of guilty to one count of Felon in Possession of a Firearm, in violation of *18 U.S.C. § 922*(g).

Defense counsel maintained that the deal was set up by an informant who needed to make deals to minimize his own sentence. Shepard, she suggested, because of his drug use, was vulnerable. It is clear that Shepard had not been targeted prior to this transaction. [**15] He simply fell into the net.

D. Other Facts

At the sentencing hearing, Shepard claimed that he had begun to "turn his life around." Influential in this change was a woman, Kathleen Cole, whom he met in 1996 while he was at Plymouth House of [*568] Correction. Cole is a certified Charge Nurse at Sunrise Care in Randolph, MA, and a certified physical trainer. During the period between March 1998 and September 1998 while he was out of jail, Shepard lived with Cole, managed to secure employment, attend A.A./N.A. programs and began counseling. n10 Since his detention at Wyatt on these charges, Cole moved to an apartment nearby. She visits him as often as is permitted and the couple writes to one another daily.

----------Footnotes----------

n10 He reported that instead of medicating himself with illegal drugs to deal with anger and depression, he took prescribed medications, which appear to be working.

----------End Footnotes----------

Finally, Shepard remarked on how his personal changes were also influenced by his rekindled relationship with his family, after many years[**16] of conflict because of his drug abuse. Indeed, he represented that in his lengthy criminal history not once had his family ever attended a court hearing. During the sentencing hearing on these charges, however, his Godmother, his sister, his niece, his sponsor at N.A., and his girlfriend were present.

III. LEGAL ANALYSIS

A. Armed Career Criminal

The government maintained that Shepard was subject to an enhanced sentence under the provisions of *18 U.S.C. § 924*(e). Specifically, it contended that Shepard qualified as an Armed Career Criminal pursuant to U.S.S.G. § 4B1.4(a). Under this provision, Shepard's base offense level would increase to 33, from 14. See U.S.S.G. § 4B1.4(b)(3)(B).

[HN4] Pursuant to U.S.S.G. § 4B1.4 and *18 U.S.C. § 924*(e), a defendant is determined to be an Armed Career Criminal if the following conditions exist: (1) the instant offense of conviction is a violation of *18 U.S.C. § 922*(g), and (2) the defendant has at least three prior convictions for a "violent felony" or "serious drug offense" committed on occasions different from one another. See U.S.S.G. § 4B1.4[**17] (App. Nts).



The term "violent felony," as set forth in [HN5] *18 U.S.C. § 924*(e)(2), provides:

The term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use of, carrying of a firearm, knife or destructive device that would be punishable by imprisonment for such term if committed by an adult, that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise, involves conduct that presents a serious potential risk of physical injury to another. n11

----------Footnotes----------

n11 The government relied only on the argument that Shepard's prior convictions constituted "burglaries" under *18 U.S.C. § 924*(e)(12).

----------End Footnotes----------

In *Taylor v. United States, 495 U.S. 575, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990)*, the Supreme Court considered whether the defendant's[**18] predicate offenses qualified as "burglary" as defined in *18 U.S.C. § 924*(e). Not content to rely on how each state might define "burglary," the Court defined generic "burglary" as the "unlawful and unprivileged entry into or remaining in, a building or structure, with intent to commit a crime." See *495 U.S. at 599*. In order to determine whether the defendant was convicted of such an offense, the Court held that [HN6] a sentencing court should narrow its inquiry to the fact of conviction, and whether the statute of conviction included the generic elements, rather than examining the facts underlying the convictions. This, it dubbed, was the "categorical" approach (which I have described as focusing on the formalities of the record). See *Taylor, 495 U.S. at 600; United States v. Damon, 127 F.3d 139, 141, 142 (1st Cir. 1997)*. n12

----------Footnotes----------

n12 Following Taylor, the First Circuit's analysis of predicate offenses has generally utilized this "categorical" approach. See e.g., *Damon, 127 F.3d at 142* (citing *United States v. Meader, 118 F.3d 876, 881-83 (1st Cir. 1997); United States v. Winter, 22 F.3d 15, 18 (1st Cir. 1994); United States v. De Jesus, 984 F.2d 21, 23 (1st Cir. 1993)*).

----------End Footnotes----------

[**19] [*569]

To be sure, the Taylor court noted there was a problem when a single state statute swept beyond the elements of generic burglary, including within it breaking and entering in places other than buildings or structures (namely vehicles or vessels), and where the defendant's plea tracks the statute. See *495 U.S. at 599; Damon, 127 F.3d at 142*. In such a case, while the sentencing judge may not hold a mini-trial on the particular facts underlying the prior offense, see *United States v. Dueno, 171 F.3d 3, 4 (1st Cir. 1999)*(citing *Damon, 127 F.3d at 144; Meader, 118 F.3d at 882)* he or she may "peek beneath the coverlet" of the formal language to ascertain whether the conviction was for a violent or a non-violent crime. See *Dueno, 171 F.3d at 4* (citing *Winter, 22 F.3d at 18)*. The question raised is how far that "peek" can go.

Not very far, is the answer; the exception to the categorical approach is a limited one. See *Taylor 495 U.S. at 600-602; Damon, 127 F.3d at 142-46*. The Court may consult "undisputed" and "accurate, judicially noticeable[**20] sources" for further guidance. See *Damon 127 F.3d at 145, 147*. [HN7] If the defendant was convicted after a trial, the court is permitted to consider what the jury instructions suggested about the verdict. If the defendant pled, the court may consider what he admitted to at his plea. See *Damon, 127 F.3d at 142; United States v. Harris, 964 F.2d 1234, 1236 (1st Cir. 1992)* (a court may consider the guilty plea when no jury instructions are available). Finally, if the relevant facts contained in the PSR are uncontested, the court may consider these as further admissions by the

defendant. See *Dueno, 171 F.3d at 7; Harris, 964 F.2d at 1236-37.*

In this case, the breaking and entering statute under which Shepard pled guilty is the hybrid kind, covering conduct which constitutes "generic burglary," and conduct which does not. n13 See *Taylor, 495 U.S. at 598; Dueno, 171 F.3d at 5* (refusing to find that all conduct described by *Mass. Gen. L. ch. 266 § 16* is violent); cf. *Harris, 964 F.2d at 1236* (assuming in dicta that breaking into and entering a vehicle is[**21] not a violent felony under the ACC). Each complaint does no more than mirror the statutory language. As a result, the government urges this Court to "peek" further to ascertain whether Shepard's crimes can be categorized as burglaries. The complaint applications and police reports, the government argued, suggested that the offenses involved breaking and entering into a "building" on all five occasions. Shepard objected, claiming that this was the very "archaeological dig" that the Supreme Court rejected.

----------Footnotes----------

n13 For statutory language, see supra note 8.

----------End Footnotes----------

I agreed with Shepard. Police reports and complaint applications do not meet the narrow exception to the categorical approach. They contain allegations that were never adjudicated before a judge or jury, never admitted by Shepard. In fact, there is no indication that the sentencing judge in the original case even had any of these documents available when he or she sentenced Shepard. See *Dueno, 171 F.3d at 6* (noting that the government provided[**22] no documents which had been before the judge when the plea was accepted).

No plea colloquies or plea agreements were offered to suggest that Shepard adopted one version of the facts rather than another for each of the convictions. Moreover, because Shepard objected to the factual representations in the PSR, the government cannot rely on the characterizations found therein. See *Harris, 964 F.2d at 1236-37.*

In fact, not only did Shepard not litigate these facts, he had no idea he had to do so. These facts -- the location of the breaking [*570] and entering -- were not necessary to his state plea. It is only now, years later, that they seem central because of a federal sentencing regime enacted years after Shepard pled.

Contrast Shepard's situation with that of a federal defendant pleading guilty today. Now, federal defendants who plead guilty make strategic decisions about which facts to contest and which to accept, carefully considering the impact their admissions will have on the ultimate sentence. The plea colloquy has assumed new significance, which it never had in the state court.

To attach such importance to facts neither litigated nor conceded violates the[**23] policies articulated by the Supreme Court in Taylor, and subsequent First Circuit precedent. n14 See *Taylor, 495 U.S. at 600-602* (unfair to impose a sentencing enhancement based on the federal court, rather than the state court's review of the facts); *Dueno, 171 F.3d at 6* (sentence defendant only for those specific "prior crimes of which he was convicted by a trier of fact or by his own admissions"). n15

----------Footnotes----------

n14 In Damon, the First Circuit articulated five important policy considerations supporting the categorical analysis. See *127 F.3d at 145-146.* First, Congress intended the Guidelines themselves to take on a categorical approach to sentencing. Following such an approach leads to like cases receiving like sentences. See *id. at 145.* Second, using a categorical approach makes sense administratively as it only requires the court to look to readily available sources of undisputed information. Alternatively, a minitrial on the facts would impose "an onerous burden, freighted with unusual evidentiary difficulties," which are time consuming and could be unfair. *Id. at 146* (citing Taylor). Third, the court found that the categorical approach honors the choice of the state in its decisions concerning which crimes to prosecute and how plea bargains should be negotiated. Fourth, the categorical approach is more or less evenhanded. On the one hand, in cases like this one, the approach may lead to lesser sentences than would result if the actual conduct could be considered. On the other hand, the approach may lead to higher sentences in other cases where a certain crime is categorically considered a "violent felony" even if the actual conduct exhibited no such violence. See id. Finally, the Court emphasized that this is a sentencing enhancement. The defendant has already been punished once for his earlier offenses. The fact that the Court is not permitted to consider the underlying conduct does not mean that the defendant somehow escapes punishment altogether. See id.



[**24]

n15 I have raised like concerns before, in *United States v. Footman, 66 F. Supp. 2d 83,* In Footman I addressed the language in the Guidelines which appeared to permit a court to look at prior criminal conduct in evaluating criminal history, and not merely prior criminal convictions. U.S.S.G. § 4A1.3(e) permits the court to consider "prior similar adult criminal conduct not resulting in a criminal conviction," so long as the information is "reliable." U.S.S.G. § 4A1.3 (Background). This section refers only to an upward departure because of the adequacy of criminal history, which is- a discretionary judgment on the part of the judge. It does not refer to the Armed Career Criminal provisions of U.S.S.G. § 4B1.4 where the consequences of a finding of a prior violent felony are automatic and draconian. Second, in Footman, I added that just because a judge is permitted to consider this information does not mean he or she should do so:

> Once one ventures past formal convictions, and formal sentences, one is in troubling territory. How can the court reconstruct prosecutions long past? Should the court essentially retry the past conduct, or rely on police reports which may well be skewed? And if a matter has been dismissed, or worse, resulted in an acquittal, how can the court, many years hence, substitute its judgment for that of the original decision-maker?
>
> *Footman, supra 66 F. Supp. 2d at 100.*

----------End Footnotes----------

[**25]

The government concedes that without the police reports or complaint applications it cannot determine the precise conduct to which Shepard actually pled guilty. Accordingly, I found insufficient evidence to conclude that Shepard's three of the five guilty pleas constituted crimes of generic burglary. See U.S.S.G. § 4B1.4; *18 U.S.C. § 924*(e). As such, the Armed Career Criminal enhancement did not apply.

B. Inadequate Criminal History Category

The government argued that an upward departure is warranted and recommended [*571]a departure of twelve levels to an offense level of 24. Two questions were raised -- the fact of an upward departure and the amount.

1. Whether an Upward Departure is Warranted

[HN8] The Commission, pursuant to its authority under the Sentencing Reform Act, determined that a defendant's "past criminal conduct" n16 is directly relevant to the purposes of sentencing: An individual "with a record of criminal behavior" is more culpable than a first offender. Moreover, "General deterrence" requires that a message be sent that "repeated criminal behavior" will aggravate the punishment. n17 Finally, the commission suggests a criminal [**26]record is correlated with recidivism on the one hand, and the limited likelihood of rehabilitation on the other. n18

----------Footnotes----------

n16 U.S.S.G. Ch. 4, Intro. Comment.

n17 Id.

n18 Id.

----------End Footnotes----------

U.S.S.G. § 4A1.1 attempts to identify the factors which correlate with these characteristics. [HN9] For the most part, the criminal history score is keyed to the length of the sentence that the individual received in state court. n19 Presumably, the longer the sentence, the more serious the underlying conduct must have been. Category

VI, however, is the highest category, reserved for anyone with a criminal history score of 13 or more.

----------Footnotes----------

n19 In addition, the score is increased if the offense was committed while on supervision, or shortly after being released from prison. See U.S.S.G. § 4(A)1.1 (d)(e).

----------End Footnotes----------

There are serious limitations with the approach which the[**27] Guidelines recognize. Policy statement U.S.S.G. § 4A1.3 (p.s.) suggests that for an egregious criminal record, the top guideline range, Criminal History Category VI, may not always be adequate to reflect the seriousness of the defendant's criminal history. See U.S.S.G. § 4A1. 3 (p.s.) Moreover, because of the way convictions are scored, an individual with five prior sentences for very large scale fraud, may have the same number of criminal history points (because of the time he or she received for each), as another who had ten small offenses for which he or she received lesser sentences per case. The former would have a far more serious criminal record, warranting an upward departure. See id.

The government called for an upward departure on a number of grounds. It relied on the same argument as it did in insisting on ACC status, namely that some of Shepard's breaking and entering convictions in reality comprise burglaries which were "violent felonies." But as noted above, I did not make that finding.

Second, the government looks to the sheer number of convictions and the general nature of his criminal habits to support an increase.

The general methodology, which I outlined[**28] in *United States v. Footman, supra* (upward departure) on the one hand, and *United States v. Leviner, 31 F. Supp. 2d 23 (D.Mass. 1999)*(down ward departure) on the other, is as follows:

. . . What is it about the [criminal history] score which created the under (or over) valuation of the record?: (i) prior sentences not counted in computing criminal history (e.g., foreign sentences), (ii) prior sentences of "substantially more than one year" that derive from independent crimes on different occasions, see § 4A1.3(a) and (b); (iii) the timing of convictions - did they follow closely one after another, or while another charge was pending, see U.S.S.G. § 4A1.3 (d); and (iv) the nature of the convictions, - e.g., assaultive behavior or non-violent conduct.

*Leviner, 31 F. Supp. 2d at 32-33.*

Here, categories (iii) and (iv) as described in Leviner, are significant. Shepard's criminal history score is 39, three times the number triggering Category VI. [*572] Moreover, the timing of the convictions bespeaks someone who is out of control - committing one crime after another while on supervision, shortly after being released.

Shepard, [**29] however, emphasizes the nature of the convictions. He has never been charged with offenses that might have warranted a Superior Court indictment as opposed to a complaint in District Court. None of his prior offenses involved firearms; most are shoplifting, trespassing, motor vehicle infractions, receiving stolen property, breaking and entering.

But while the offenses did not involve firearms per se, and may not formally be "violent crimes" or "burglaries" under U.S.S.G. § 4B1.4, the record, however characterized, still suggests the likelihood of recidivism. One does not have to "peek beneath the coverlet" to conclude this.

2. Extent of Departure

a. Degree of Departure

[HN10] In calculating the appropriate offense level when the Criminal History Category is already VI, the Guidelines instruct the Court to depart by moving incrementally down the sentencing table to the next higher offense level until it finds the range appropriate for the case. See U.S.S.G. § 4A1.3 (p.s.).

[HN11] In determining "appropriateness," I am guided by the statute creating the Federal Sentencing Guidelines, the Sentencing Reform Act. It directs me to impose a sentence "sufficient, but not greater[**30] than necessary, to comply with the purposes set forth. . ." *18 U.S.C. § 3553*(a).

While Shepard's record suggests recidivism, it also suggests an out of control drug addict. Shepard gets out of jail, and returns to drugs, and the crimes he must commit in order to afford the drugs. Whatever sentence I impose must also include serious attention to Shepard's addiction. I have been told by the Probation Department that a sentence in the Guideline range of 30-37 months would not qualify Shepard for participation in the intense drug treatment program of the Bureau of Prisons. n20 Only a sentence at 46 months or more would suffice.

----------Footnotes----------

n20 [HN12] The Bureau of Prisons considers only the amount of time in its custody in calculating the prerequisites for the intensive drug treatment program. A guidelines sentence, minus the amount already served in pre-trial detention, will not suffice.

----------End Footnotes----------

Shepard has never before served a federal sentence in a prison far from home. He has never served more than 2.5 years, and[**31] never in any institution other than the House of Correction. A departure to offense level 14, a Guideline range of 37-46, and a sentence at the high end, would be "sufficient," but not "greater than necessary" to meet all purposes of the Sentencing Reform Act. n21

----------Footnotes----------

n21 The purposes set forth in [HN13] *18 U.S.C § 3553*(a)(2) are:

(A) to reflect the seriousness of the offense, to promote respect for the law and to provide just punishment for the offense;
(B) to afford adequate alternative to criminal conduct;
(C) to protect the public from further crimes of the defendant, and;
(D) to provide the defendant with needed educational or vocational training, medical care or other corrective treatment in the most effective manner.

----------End Footnotes----------

As such, I sentenced Shepard as follows:

I departed up two levels, to an offense level of 14. The Guideline range for this level at Criminal History Category VI is 37-46 months. I sentenced Shepard to 46 months in prison, with three years supervised release. [**32] In addition, I recommended that Shepard participated in the 500 hour Intensive Drug Treatment program in the Bureau of Prisons and directed him to send periodic reports to me of his progress.

-SO ORDERED.

Dated: January 20, 2000

NANCY GERTNER, U.S.D.J.

APPENDIX B

United States v. Shepard,
December 19, 2000 Order of Court
Denying Motion for Reconsideration
and
Reconsideration En Banc

United States v. Shepard,
November 24, 2003 Order of Court
Denying Motion for Reconsideration
and
Reconsideraton En Banc

# United States Court of Appeals
## For the First Circuit

No. 99-2167

UNITED STATES,

Appellant,

v.

REGINALD SHEPARD,

Defendant, Appellee.

Before

Torruella, Chief Judge,
Selya, Boudin, Stahl, Lynch, and Lipez, Circuit Judges,
and Keeton, District Judge. **

**ORDER OF COURT**
Entered December 19, 2000

The petition for renearing addresses a jurisdictional issue raised by appellee on appeal but not addressed explicitly in the panel's decision. Petitioner stated that the relevant provision of the jurisdictional statute invoked by the government provides for appellate review of "an otherwise final sentence if the sentence . . . was imposed in violation of law." 18 U.S.C. § 3742(b). The petition argued that the district court's ruling in this case was discretionary, and that the panel opinion thus does not correct a violation of law. This is not the case. As the panel opinion makes clear, the district court made a legal ruling. There was

jurisdiction to hear the appeal under § 3742(b). The petition for panel rehearing is denied.

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges voting that the case not be heard en banc, it is ordered that the petition for rehearing en banc be denied.*

By the Court:

PHOEBE MORSE
Clerk

*Judge Selya and Judge Lynch dissented from the denial of the petition for rehearing en banc.
** Judge Keeton, District Court Judge of the district of Massachusetts, sitting by designation
[ cc: Messrs. Pellegrini, Chaitowitz, Zacks, Feeley and Thomason]

# UNITED STATES COURT OF APPEALS
# FOR THE FIRST CIRCUIT

No. 02-1216

UNITED STATES,
Appellant,

v.

REGINALD SHEPARD,
Defendant, Appellee.

Before

Boudin, Chief Judge,
Torruella, Selya, Lynch, Lipez and Howard, Circuit Judges.

ORDER OF COURT

Entered: November 24, 2003

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

RICHARD [illegible] NOVAN
Clerk.

[cc: Ms. Thompson and Ms. Young]

APPENDIX C

United States v. Shepard,
December 31, 2003 Order of Court
Staying Mandate Pending Petition for Certiorari

# United States Court of Appeals
## For the First Circuit

No. 02-1216

UNITED STATES OF AMERICA,
Appellant,

v.

REGINALD SHEPARD,
Defendant, Appellee.

Before
Boudin, Chief Judge,
Torruella and Lipez, Circuit Judges.

ORDER OF COURT

Entered: December 31, 2003

On motion of appellee Reginald Shepard for an order staying mandate, the issuance of the mandate is hereby stayed pending the filing of a timely petition for certiorari and, if a timely petition for certiorari is filed, pending a resolution of the petition by the Supreme Court. If the petition for certiorari is denied, the mandate shall issue forthwith. If the petition is granted, the stay of mandate shall continue until disposition of the case by the Supreme Court. Counsel for appellee Shepard is directed promptly to notify the Clerk of this court both of the filing of any such petition for certiorari and its disposition.

It is so ordered.

By the Court:

**MARK R. SYSKA**

Mark R. Syska, Chief Deputy Clerk.

[Certified copies to Hon. Nancy Gertner, Mr. Tony Anastas, Clerk, United States District Court for Massachusetts. Copies to Ms. Pellegrini, Ms. Young, Ms. Chaitowitz and Ms. Thompson.]

APPENDIX D

18 U.S.C. § 924(e)

UNITED STATES CODE SERVICE

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*** CURRENT THROUGH P.L. 106-580, APPROVED 12/29/00 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 44. FIREARMS

18 USCS § 924 (2000)

§ 924. Penalties

* * * *

(e) (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act *(21 U.S.C. 801* et seq.), the Controlled Substances Import and Export Act *(21 U.S.C. 951* et seq.), or the Maritime Drug Law Enforcement Act *(46 U.S.C. App. 1901* et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act *(21 U.S.C. 802))*, for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.